THE CONVEYANCER AND PROPERTY LAWYER

VOL. 23, NO. 2 MARCH—APRIL, 1959

CONVEYANCER'S NOTEBOOK

CONTROL OF BORROWING

The control of borrowing has now largely disappeared as a result of the General Consent under the Control of Borrowing Order, 1958, which was issued on February 4 and came into operation the following day. The original Order stands unamended but the General Consent authorises generally: (a) the borrowing of any money; (b) the raising of any money by any body corporate by the issue of shares; (c) the issue by any body corporate of any shares or other securities; and (d) the raising of any money for the purposes of a unit trust scheme by the issue of units under the scheme, and the issue of any units under a unit trust scheme. There are a number of exceptions which remain subject to the Order. Local authorities and persons resident outside the United Kingdom remain subject to full control.

The most important exceptions are, however, the issue of redeemable shares or other redeemable securities if the purposes or effects of the transaction consist of or include the capitalisation of profits or reserves; and the issue of any shares or other securities if the purposes or effects of the transaction consist of or include the exchanging or substituting of new securities for redeemable securities already issued, unless such securities are not redeemable or are redeemable not earlier than the earliest date on which the securities already issued are redeemable. In these cases consent is still required under the Order: art. 4 (6) and (7); subject to the general exemption of £50,000 in any one year under art. 8.

End of the Chancellor's Concession

The Chancellor's concession, whereby for estate duty purposes owner-occupied houses if retained by members of the deceased's family were valued without regard to any element of the value attributable solely to the fact that they could be sold with vacant possession, came to end on January 20, and the concession does not apply in the case of any death after that date. This decision probably merely recognises the fact that the vacant possession element has ceased to exist. Although it is often difficult—though by no means impossible—to obtain a lease or tenancy of a flat without the payment of key money, the housing shortage seems to have almost disappeared.

"Competent Landlord" under the Landlord and Tenant Act, 1954

Under Part II of the Landlord and Tenant Act, 1954, a tenant of business premises is granted rights which are exercisable against his competent landlord, who is not necessarily the same person as his immediate landlord. The competent landlord is the person entitled to the reversion, whether mediate or immediate, provided he is either entitled to the fee simple or a leasehold interest which will not come to an end within fourteen months or less by effluxion of time or by virtue of a notice to quit already given by his landlord: s. 44 (1). There may be more than one person who complies with these conditions and, if so, it is the person first in the upward chain from the tenant who is the competent landlord. This definition presents some difficulty in application: see Woodfall's *Landlord and Tenant*, Permanent Supplement, Vol. I, pp. 76–79.

Let us consider the common case where A is the freeholder, B the tenant of the whole building for a fixed term and C the sub-tenant of part, the sub-tenancy expiring three days before the head tenancy. Let us further assume that B's lease expires on December 25 next. Is A the competent landlord *vis-à-vis* C? B's tenancy will, under the Act, continue until either A serves a notice to terminate under section 25 or B serves a notice requesting a new tenancy under section 26: s. 24. *Woodfall's* view is that section 44 is directed to the common law position and draws attention to the two phrases "effluxion of time" and "notice to quit." It is, however, quite possible to give full effect to every word of the definition without accepting this view. A lease of business premises for a fixed term will still expire by effluxion of time if the lessee is out of possession (s. 23) or if the tenancy

is for a fixed term not exceeding three months (s. 43 (3)). A notice to quit includes a notice exercising an option to break a lease (s. 69 (1)), and may well be comprised in a notice to terminate.

In *Cornish* v. *Brook Green Laundry, Ltd.* [1959] 2 W.L.R. 215 (noted *post*, p. 143), the Court of Appeal decided, against *Woodfall's* view, that in our example B remains the competent landlord *vis-à-vis* C until a term is put upon B's interest, either by A serving a notice to terminate on B, or by B serving a notice requesting a new lease on A. The court was unable to find anything in the Act indicating any contrary intention. It is in this instance more important that the rule should be clear than what the actual rule is, for up till now the superior landlord and the sub-tenant have not known for certain how and upon whom they should serve their notices.

The decision does not, however, overcome all difficulties. Supposing C gets his blow in first and serves a notice on B requiring a new lease, B cannot rely on section 30 (1) (*e*) and allege that a letting of the premises as a whole would bring in a higher rent than lettings in parts, though A might well wish to allege this. C should not take too much comfort from this as the court might well grant him only a short term so as to enable A to let the premises as a whole in the not too distant future. If A moves first he must remember not to serve notices to terminate on B and C at the same time; the notice served on C must be after the notice served on B.

The five-year rule. Cornish v. *Brook Green Laundry, Ltd., supra*, also serves to draw attention to one of the difficulties in the application of the rule that a landlord cannot oppose the grant of a new lease on the ground that he requires the premises himself, where his interest was created or purchased within the last five years—we state the rule contained in section 30 (2) in a simplified and not wholly accurate form. If B, in our above example, negotiates a new lease with A, once the lease is granted he will have to wait five years before he can get C out on the ground that he requires the premises himself. In *Cornish's* case, fortunately for B, the new lease had not in fact been granted and B succeeded.

Covenant to Repair Structure and Main Walls

It is very common in leases of parts of buildings for the landlord to undertake the obligation to repair the roof, main walls and structure. On the face of it, the obligation is clear and devoid of ambiguity. As Vaisey J. so lucidly put it in *Granada Theatres*,

Ltd. v. *Freehold Investments (Leytonstone), Ltd.* [1958] 1 W.L.R. 845, at p. 848, "'structural repairs' means repairs of, or to, a structure." One might have thought that after all these years almost every part of a building had been analysed and pigeon-holed "structure" or "non-structure." Alas, the courts for the most part have merely generalised. We must therefore welcome the recent decision of the Court of Appeal in *Holliday Fellowship, Ltd.* v. *Hereford* [1959] 1 W.L.R. 211 (noted *post*, p. 144), where the court decided that ordinary windows are not part of the walls or structure, but are things inserted in the walls. "Windows" were taken to mean the glass panels and the wooden framework and apparatus in which the glass is placed. The court distinguished *Boswell* v. *Crucible Steel Co.* [1925] 1 K.B. 119, where the Court of Appeal held that the shop windows in that case were part of the walls of the building; and *Taylor* v. *Webb* [1937] 2 K.B. 283, where the Court of Appeal held skylights which were a very substantial part of the roof were to be treated as part of the roof for the purposes of liability to repair the roof. In the instant case the court pointed out that it was a matter of degree and a question of fact. The Crystal Palace was a building with glass walls and a glass roof and the windows and their framework were a part of the structure, but an ordinary window is not part of a wall, still less of a main wall, which is a wall which supports the structure of the building and has directly to do with its stability. It may also be inferred from the judgments that ordinary skylights and doors and their framework are not part of the structure.

Loss of the Deposit

There is a dearth of authority on the position where a deposit is paid to an estate agent before contract and the estate agent makes away with it. Mr. D. Macintyre examined the subject in an article with the above title in Vol. 22, p. 258, particularly at p. 261, where he took the view that the loss must be borne by the potential purchaser if the contract is never in fact signed. In *R.* v. *Pilkington* (1958) 42 Cr.App.R. 233, the appellant was convicted of fraudulent conversion of deposits, alleged in the indictment to have been received by him for and on behalf of purchasers. He contended that he was acting as agent for the vendor. The leading cases on the subject, such as *Fenton* v. *Browne* (1807) 14 Ves. 144 and *Annesley* v. *Muggridge* (1816) 1 Madd. 593 (which show that though a deposit is paid to the estate agent as stakeholder, he is, so far as risk of loss of deposit is concerned, considered as the agent only of the vendor), were

not apparently cited, and the Court of Criminal Appeal held that there was ample evidence that the deposits were paid to the appellant as stakeholder and not as agent for the vendor. The judgment appears to assume that no contracts were signed and does not throw any doubt on the proposition that the loss falls on the vendor once the contract is signed, even though the estate agent, unknown to either party, has already made away with the money.

Form 2, p. 654—Correction

A subscriber has pointed out that in the above precedent which appeared in the January–February issue there is no express release by the building society of its security. To correct this omission the words " and the Society as mortgagee hereby releases " should be inserted in the ninth line of clause 1 on page 656 between the words " confirms " and " unto the Purchaser."

THE TOWN AND COUNTRY PLANNING BILL

By J. K. Boynton, m.c., ll.b., Solicitor

The Town and Country Planning Bill left the Standing Committee of the House of Commons on March 5: it seems now that the Bill will not receive the Royal Assent until the end of the present Session, which is later than was first expected. The Act will come into operation one month after it is passed by Parliament (*a*). Meanwhile, the Government have announced the interim arrangements for the assessment of compensation in Ministry of Housing and Local Government Circular No. 58/58, dated November 18, 1958 (*b*). Where it is imperative for one reason or another for an authority to get possession of land urgently and they can buy by agreement at a price certified by the District Valuer to be in accordance with the provisions of the Bill, that price, states the Circular, will be accepted for the purposes of loan sanction and of any exchequer grant, provided that there was no contract entered into before October 30, 1958.

The Bill is a "mixed grill": the meat being in Part I dealing with compensation for compulsory acquisition. Part II, which relaxes control over the land dealings of local authorities, is quite out of context and the citation "Town and Country Planning Acts, 1947–1958" will not include Part II of the Bill (*c*).

The main provisions of the Bill have caused little controversy amongst local authorities or in the House. The financial memorandum which accompanies the Bill estimates that local authorities and Government Departments will pay overall something like 25 per cent. more for their land in future. Local authorities seem prepared to do this, no doubt for two reasons:

(a) In some cases proposals have been deferred because of the unfairness which the old compensation provisions would have caused to an owner, and

(b) authorities have sometimes taken land not really suitable for their purposes, to avoid the difficulties which would have arisen if the most suitable site had been acquired on the basis of existing use value plus admitted claim.

(*a*) Clause 45. All references are to the numbers of clauses in the Bill as introduced.

(*b*) H.M.S.O., price 2d.

(*c*) See clause 45.

I—Compensation for Compulsory Purchases

Compensation on market value basis

The Bill restores the "market value" basis of compensation to all cases of compulsory acquisition where the notice to treat is served after October 29, 1958.

Some clauses—for example, clause 4 (Certification of appropriate alternative development)—apply in terms to all purchases, whether by compulsion or agreement, by an authority possessing compulsory purchase powers. The effect of the Bill will, in practice, be to make market value the basis for all purchases by Government Departments, public and local authorities in the future.

Acquisition at market value was the basis in force (*d*) before the 1947 Act made its sweeping changes in the whole system of land values. The rules which were applied to the assessment of compensation in pre-1947 cases are to be found in the Acquisition of Land (Assessment of Compensation) Act, 1919. That Act introduced in statutory form six rules for assessing compensation, of which the two most important may be summarised as follows:

> Rule 2—The value of land shall . . . be taken to be the amount which the land, if sold in the open market by a willing seller, might be expected to realise.
>
> Rule 3—The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department, or any local or public authority.

Although the 1919 Rules still applied after the passage of the Act of 1947, they were subject to the vital modification that compensation was to be limited to "existing use value." This limitation became, after the passage of the Act of 1954, "existing use value plus the amount of any admitted claim." These statutory ceilings on compensation are swept away by clause 1 of the Bill, and the 1919 Rules will apply without qualification to the ascertainment of the value of land acquired in the future.

Modification of the Rules in the Act of 1919

There are three principal modifications made by the Bill to the Rules in the Act of 1919:

(*d*) The Town and Country Planning Act, 1944, put a "ceiling" on compensation by tying market value to 1939 prices.

(i) No enhancement (or diminution) in value, which is due to the scheme for which the land is being acquired, is to be taken into account in assessing compensation. This puts into statutory form a rule of case law which has become well established in cases decided following the passage of the Act of 1919. The provision will not exclude values which, in the absence of the scheme altogether, might have been expected to arise, *e.g.*, owing to the prospects of development existing quite apart from the scheme.

(ii) If the value of other land of the same owner is enhanced by the scheme, this enhancement will be set off against the compensation otherwise payable to the owner. There will be no set off of value which but for the scheme could have been expected to arise in any case. This makes general the rule found in a number of other statutes, *e.g.*, the Housing Act, 1957.

(iii) Compensation will not be reduced because depreciation has been caused by the threat of compulsory acquisition, " whether indicated by any designation, allocation or other particulars contained in the current Development Plan or otherwise."

Clause 7 provides, by means of a table, the method of determining the extent of a " scheme " for the purpose of these three rules.

Planning assumptions

To ascertain market values under the present system of planning control is a very different operation from that envisaged by the framers of the six rules in the Act of 1919. What the market will pay is vitally affected by the permissions which may be obtainable from the local planning authority.

This is not the place to debate whether the Government's machinery is as simple and effective as could be desired to answer the question: What sort of development might be granted for the land in question, and subject to what conditions? Suffice it to say that there are eight lengthy clauses which deal with this problem.

General assumptions

In the first place, the Government have had to deal with the type of case where no planning permission has been issued for the proposals of the acquiring authority. This is not a very usual type of case. In the normal way, if a local authority buy land for housing, for example, they will only do so after they have taken

the precaution of obtaining an outline planning permission for housing development on the land. In many cases housing value will be the market value and no further inquiries as to planning permissions will have to be made. Government Departments, however, are able to develop without the necessity for planning permission. In this type of case the Bill provides, in clause 2, for a notional planning permission to be attached to the land such as would permit development of it in accordance with the proposals of the acquiring authority.

Then there is the conception of existing use embodied in the Third Schedule to the Act of 1947. The conception of existing use in relation to compulsory acquisition is abolished by the Bill. It is therefore necessary to provide specifically that permission shall be deemed to be granted for any development mentioned in the Third Schedule to the Act of 1947. This schedule deals with such matters as the right to rebuild an existing building.

Sometimes a planning authority will grant a personal planning permission, *i.e.*, limited to the applicant. These permissions have to be excluded in assessing value because they do not attach to the land.

There are also cases where compensation has already been paid in respect of the land under some provision in the Act of 1947, *e.g.*, by virtue of an Order under section 26 discontinuing an authorised use. It is necessary in these cases to provide against a double payment of compensation occurring and the Bill does this in clause 2 (4).

Land included in development plans

If land is included in a development plan it is a fair assumption that a planning permission will be forthcoming for development in accordance with the plan. The Bill makes detailed provision as to the way in which these assumptions are to be worked out. For example, a plan may allocate the site for a specific purpose, *e.g.*, as a school or a sewage works. Here, it is to be assumed that planning permission would be forthcoming for the development indicated.

In the majority of cases, the development plan will not indicate a particular type of development, but will show an area as being allocated primarily for a specified use, *e.g.*, residential or commercial. Here, it is to be assumed that planning permission would be granted for any development which is residential or commercial in character *and* is development for which planning permission might reasonably be expected to be granted. This means that if, for example, the use in the plan were commercial, it would not

be possible to assume always the most valuable commercial use, but rather the kind which would be reasonable.

Whilst a development plan may give some general guidance to standards, *e.g.*, of density, it will need detailed interpretation in relation to a particular site. Clause 3 (6), therefore, provides that the planning permission is to be assumed to be granted subject to such conditions as might reasonably be expected to be imposed by the planning authority.

Certificates of alternative development

There are a number of cases in which the approved development plan will offer no guide or no sufficient guide to the planning permissions which might be obtainable. The Bill deals with this position by introducing a system of certification. Either of the parties directly concerned—normally this means the acquiring authority or the owner of the land—can apply to the local planning authority (or, on appeal, the Minister) for a certificate to say what development might reasonably have been expected to be permitted if the land were not proposed to be acquired compulsorily.

Certificates are required in three classes of case:

(a) where there is no approved development plan;

(b) where the approved development plan leaves the site without notation, *i.e.*, it is not the subject of any planning proposal—this is commonly the case in rural areas and areas on the fringes of towns;

(c) where the site is earmarked on the plan specifically for some public purpose, *e.g.*, is shown as a site for a new school, a sewage works, a public library, etc.

There are certain important points for an owner to bear in mind in relation to this provision:

(a) An application for a certificate cannot be made after a reference has been made to the Lands Tribunal to determine the compensation, unless (i) the other party consents, or (ii) the Lands Tribunal gives leave.

(b) The applicant is required in his application to specify one or more classes of development which would appear to be appropriate. The authority will not, however, only look at the specified classes but will issue a certificate to indicate what classes of development might reasonably have been expected to be granted—whether or not these are referred to in the application. It is nevertheless desirable that an applicant should be properly advised before making his application. He will often be in a better position than the

authority to see the development potentialities of his land, and should make his application accordingly.

(c) No certificate is possible if the land is in an area allocated for uses of a residential, commercial or industrial character—because in these cases the assumptions to be made are determined by clause 3 (2) and (3).

Once again, there is provision to import into the certificate the conditions which would be reasonable in the circumstances. A copy of the certificate is to be served on the other party concerned by the local planning authority.

Assumptions which the "market" would make

Having considered the provisions of the Bill relating to planning permissions, it is most important to emphasise that the whole of these provisions are subject to the fundamental conception that compensation is to be based on the 1919 Rules, *i.e.*, on what the property would fetch in the open market. This means that although there is no specific mention of them in the Bill, a valuer will have to take into account such matters as the following, which may affect the market value:

(a) whether the land has any existing planning permission attached to it. This obviously affects the value of the land in the open market;

(b) whether the land has all services available: whether access can be obtained, and if so under what conditions;

(c) whether the land has some long-term development possibilities, *e.g.*, if it is land on the fringe of a development area which may become available for development on some revision of the plan in the future;

(d) whether there are any proposals for amending the development plan which would affect the land in question. The Bill in clause 3 (7) ties the statutory assumptions to the approved plan. A purchaser might nevertheless pay something more because of a proposal in a plan submitted to the Minister but not yet approved;

(e) whether permission might be obtainable for some ancillary use of the land, in addition to the primary use shown in the development plan. For example, if land is zoned as residential, a statutory assumption of a residential permission can be made under clause 3 (2): but this will not rule out the possibility that permission for shops or offices might be granted. These are ancillary uses and in some circumstances are appropriate in a residential area.

These are but a few of the matters with which the Bill does not deal specifically. They may all, however, affect the market value of the land. To the extent to which they do, they will have to be taken into account, besides the specific statutory assumptions about planning permissions and the like.

Additional compensation—five-year period

The Bill introduces one conception which is quite foreign to normal market transactions.

Where, within five years of completion, permission is granted for some additional development of the land, the vendor (or his personal representative (*e*)), is to receive additional compensation (*f*). This will, of course, only be payable if the new permission is more valuable than those taken into account when compensation was assessed on purchase. The measure of additional compensation is the difference between the compensation actually paid and what would have been payable if the additional permission had been in force at the time of the sale.

No additional payment will be made in the case of purchases of land in new towns or areas of town development schemes, or in areas of comprehensive development.

Where the purchase price on the original purchase contained (or would have contained if the additional permission had been taken into account at that time) some element attributable to disturbance, severance or injurious affection, the provisions of the Third Schedule become operative. They also apply where the purchase price has been reduced because "the scheme" has benefited other adjoining land of the vendor.

The effect is to bring (a) the additional compensation for severance, or (b) the reduction for benefit to adjoining land, as the case may be, into account, unless there has been a sale-off of the whole or part of that other land.

Not all additional permissions will attract additional compensation. Something must be permitted which lies outside the purposes for which the interest was acquired.

Address for service

The payment has only to be made if the vendor applies for it. The Bill protects a vendor by providing that he shall be entitled to notice from the acquiring authority of any such additional

(*e*) A vendor's trustee in bankruptcy or liquidator will also acquire the right.
(*f*) Clause 14.

permission of which they become aware, if an address for service has been furnished under the clause.

Compensation must be claimed within six months of notification: or, if no address for service has been given, within six months of the new planning permission.

Sales by agreement

The provisions of the clause apply if a sale is "by agreement in circumstances corresponding to a compulsory acquisition." This is defined in clause 43 (6) and covers all sales by agreement.

Area of comprehensive development

It may be convenient to bring together the various provisions applicable to the purchase of land in an area of comprehensive development. This is subject to special provision as follows:

(a) No certificate of alternative development is obtainable (clause 4 (1) (a)).

(b) The special assumptions as to planning permission do not apply (*g*).

(c) Instead the land will get the benefit of one of the range of uses indicated in the plan as the proposed uses of land in the comprehensive development area. The particular use to be chosen is to be that which might reasonably have been expected to have been the subject of planning permission if there had been no development scheme at all. In other words, the detailed planning provisions of the scheme are *out*, but the range of uses for the area is *in*. This range is to be considered in relation to the *old* layout and not the *new* proposals in the comprehensive development scheme. Suppose, therefore, that Whiteacre is to become part of a new road in the development proposals. The owner will not lose on this account for these actual proposals are to be disregarded. Similarly, if Blackacre, lying within an area scheduled for commercial redevelopment, is to be the site for a multiple store, its owner will not necessarily get store value: he may have to take something less. The authority will not buy dear because the new use, a store, is lucrative—the Blackacre case: nor will they buy cheap because the new use, a road, has no market value—the Whiteacre case.

(*g*) Clause 3 (2).

(d) No additional compensation will be payable under clause 14 if new planning permission is granted within five years of the compulsory acquisition.

Special cases

There are a number of cases where it is necessary to amend the existing law, based as it is upon the compensation provisions in the Town and Country Planning Acts, 1947 and 1954. If no amendments were made, the return to market value as the basis for compensation would bring about anomalies.

Unfit houses

Various provisions of the Housing Act, 1957, make provision for purchase at site value, *i.e.*, section 12 (4), section 29 (2) and section 59. But under market value rules, site value would often exceed the value of the site with a house on it. This is because the house is a liability and the costs of demolition have to be taken into account before redevelopment possibilities can be realised. The new Bill accordingly makes provision that compensation shall not exceed the full value of the land and buildings upon it (*h*).

The opportunity is taken to amend the procedure which applies when houses are being acquired under Part IV of the Town and Country Planning Act, 1947, section 6 of the Town Development Act, 1952, or clause 31 of the Bill; and those houses are considered by the housing authority to be unfit for human habitation. The aim of the new procedure is to ensure that the issue of unfitness shall not arise *after* the compulsory purchase order has been made.

The Housing Act, 1957, is also amended as regards (a) the purchase of houses capable of being made fit for habitation, and (b) war-damaged unfit houses (*i*).

War-damaged land

The compensation for war-damaged land will in future be what the land would fetch in the open market. This will be affected by whether the land has the benefit of the right to a "cost of works" payment or a "value payment" under the War Damage Act, 1943, ss. 13 and 14. A "cost of works" payment is made when the owner intends restoration: a "value payment" when he does not, *e.g.*, because the land in its damaged state has a higher potential value than if it were restored.

The necessary amendments to existing legislation are made in

(*h*) Clause 8 and Second Schedule.
(*i*) Second Schedule, paras. 3 and 4.

clause 9 of the Bill, to ensure that market value will be the basis for future acquisitions of war-damaged land.

Local and public authorities' land

Under the 1947 Planning Act, various authorities and bodies were precluded from claiming on the £300 million fund. In return they were given some special privileges. One of these was the right to be compensated at "prevailing use" value if their land was compulsorily acquired. This was a particularly valuable concession in the case of land held for charitable purposes.

This special provision for land held by local authorities, statutory undertakers, charities, and the National Coal Board, is no longer necessary and clause 10 removes it.

Removal and disturbance allowances

The Planning Acts and the Housing Act, 1957, and some other Acts as well, allow authorities to make discretionary payments to persons with no legal claim. The new Bill (*k*) makes this discretionary power general: it will apply both to compulsory acquisitions proper and to sales by agreement corresponding to a compulsory acquisition.

Payments may be made to cover:

(a) removal expenses;

(b) losses likely to be incurred by a trade or business arising from removal.

This discretionary power should be especially valuable where small shops are being acquired. Although let on a weekly or monthly tenancy, they will often change hands in the open market at a substantial price based upon goodwill. A weekly tenant has, however, no legal right to claim compensation: now he may ask for an *ex gratia* payment under the Bill.

Long-standing notices to treat

It may surprise some to learn that there are in existence a considerable number of compulsory purchase orders—probably about 1,000—which have never been brought to a conclusion, although notice to treat has been served. Where a notice to treat was served before the outbreak of hostilities in 1939, it not infrequently happened that the authority took no further steps in the matter. The Bill aims to clear off the books all these long-standing notices to treat, and in effect fixes a time limit of eighteen months from the commencement of the Act for the purpose.

(*k*) Clause 11.

If the authority do nothing for six months after the commencement of the Act (*l*), their powers will automatically lapse.

If they wish to exercise any rights or powers in pursuance of the notice, they must serve a notice of intention to proceed within the six-months period. The notice will clearly explain the owners' rights.

Within six months of receipt of such a notice, an owner can claim to have the compensation assessed on the 1954 Act basis, *i.e.*, existing use value plus any admitted claim, instead of at 1939 values. He cannot make this claim if he is not the original owner but a person who has bought the property since the notice to treat was served—for such a person will have learnt of the compulsory purchase order and paid an appropriate price.

The Bill lays down an eventual time limit for bringing the whole matter to a conclusion. This is twelve months after the service by the authority of notice to proceed. By this date either (a) the compensation must have been agreed, or (b) the matter referred to the Lands Tribunal. Otherwise the authority's powers will lapse.

The above provisions apply to most, but not all, notices to treat served before August 6, 1947. Clause 12 (1) exempts from its provisions certain classes of long-standing notices, *e.g.*, where the authority have entered into possession. The Government intend, however, to preserve the position of owners in those cases where a local authority has entered into possession after the Bill was published.

II—Local Authorities' Land Transactions

Part II of the Bill relaxes departmental control over some land transactions of local and public authorities. As part of their revision of local government finance, the Government promised that a review would be made of central control over local authorities. This review, which is being undertaken in consultation with the associations of local authorities, has not been completed. Agreement has, however, been substantially reached about the relaxations desirable in the case of sales and purchases of land by local authorities. Part 2 of the Bill gives effect to the Government's proposals.

Purchases by agreement

In the case of all contracts of purchase entered into by a local authority after the commencement of the Act, it will no longer

(*l*) *i.e.*, seven months after Royal Assent.

be necessary for the authority to obtain a Ministerial consent to the purchase, unless they are buying land outside their own area for future requirements (*m*).

Only purchases by agreement are affected. Compulsory purchases will still be subject to approval by the appropriate Minister.

Sales by local authorities

At the present time a local authority can neither sell land nor lease it for more than seven years without Ministerial consent (*n*). Although it is not usual to abstract such a consent, and it does not usually form part of the title, its production should be called for by a purchaser: and the giving of the consent is usually recited in the conveyance. There is no direct authority as to the effect of sale without a necessary consent, but on the analogy of a sale by a charity without the consent of the Charity Commissioners, the sale will be void (*o*).

The effect of a failure to obtain Ministerial consent to a lease was recently considered by Harman J. (*p*), who held that the lease, being *ultra vires* the local authority, was void and not merely voidable. By analogy a sale without a necessary Ministerial consent would also be void.

In future it will be necessary for the purchaser's solicitors to make inquiries as to the existence of a Ministerial consent if:

(a) the land forms part of an open space;

(b) a house is being sold which was bought with the aid of a housing subsidy;

(c) the land is within an area of comprehensive development under the Planning Acts;

(d) a common is being sold;

(e) the land is allotment land; or

(f) the land was acquired in the exercise "directly or indirectly of compulsory powers." This is defined in clause 23 (5) and includes acquisitions by agreement at a time when the authority were authorised to acquire the land compulsorily.

In these cases a consent is still needed and should be produced to the purchaser.

It may be that the Government will introduce a proviso to clause 21 making it clear that a purchase cannot be impeached

(*m*) Clause 17.
(*n*) Local Government Act, 1933, ss. 164 and 165.
(*o*) *Re Mason's Orphanage and L. N. W. Ry.* [1896] 1 Ch. 596.
(*p*) *Rhyl U. D. C.* v. *Rhyl Amusements, Ltd.* [1959] 1 All E.R. 257.

because the authority have failed to comply with its provisions (*pp*). If no such protection for purchasers is written into the clause, a recital in the following form might be included in the conveyance to meet the position:

> " and whereas by virtue of section 21 of the Town and Country Planning Act, 1959, the vendors are not required to obtain the consent of any Minister before exercising their power of disposing of the said land."

The authority may only sell without Ministerial consent if the price is the best which is reasonably obtainable. In case of doubt a purchaser's position can be safeguarded by requiring a sight of the District Valuer's report, which a local authority will normally obtain to support an application for Ministry loan sanction.

III.—Planning Applications, Appeals and Orders. Administrative Procedures

Part III of the Bill implements some recommendations of the Franks Committee.

Challenge in the High Court

At the present time, a person aggrieved may challenge the confirmation of a development plan in the High Court (Act of 1947, s. 11). Other orders, etc., can only be challenged by a motion for a prerogative writ.

Clause 24 extends the right of challenge, broadly speaking, to all orders or Ministerial decisions relating to the control of development under Part III of the Act of 1947, including the review of planning decisions where compensation is claimed under section 23 of the Act of 1954. Examples of orders or decisions which may be so challenged include: revocation orders; orders discontinuing authorised uses; tree preservation orders; a Ministerial decision on a " called-in " application; purchase notices.

The grounds of an application to quash are either:

(a) that the order or action is *ultra vires*, or

(b) the existence of some procedural defect. But the court is not obliged to quash in this case if the applicant's interests have not been substantially prejudiced by the failure to comply.

The High Court may, by interim order, suspend the operation

(*pp*) The Government spokesman in the Committee has indicated that *some* protection for purchasers is desirable and will be introduced into the Bill (Official Report, Standing Committee D, March, 3, 1959, Col. 1059).

of an order or decision, unless a tree or building preservation order is involved. A tree preservation order can, however, be quashed in part, as can an order defining an area of special advertisement control. Other orders can only be quashed as to the whole order.

In view of the decision of the Divisional Court in *Jones* v. *Ealing Borough Council* (*q*), it seems clear that the local planning authority will not always be able to apply to the court, as they may not be "a person aggrieved."

Section 17 determinations

Where a prospective developer has anything much at stake he may well be reluctant, as the law stands at present, to use the procedure in section 17 of the Act of 1947, because the final decision on a matter of law rests with the Minister. It will be recalled that section 17 allows a determination to be given as to whether proposals do or do not need planning permission.

In future an applicant will have a right of appeal to the courts (*r*), and will not have to carry out his development and risk the service of an enforcement notice—the only means at present, apart from a declaration, of getting the matter settled by the courts.

Purchase notices

The opportunity has been taken in the Bill to make a number of changes in the procedure for confirmation of purchase notices served under section 19 of the Act of 1947. The clause as amended by Committee D clears up the difficulty created by the decision in *R.* v. *Minister of Housing and Local Government, ex p. Rank Organisation* (*s*). The main amendments in the clause in the Bill as introduced are:

(a) a purchase notice served after the commencement of the Act can be taken up by a willing local authority without waiting for Ministerial confirmation;

(b) the server of a notice has a statutory right to a hearing in all cases.

Publicity for applications for permission

A development order after the Bill becomes law will designate certain classes of development which might be thought to be especially troublesome neighbours. Any application for development

(*q*) [1959] 1 All E.R. 286.
(*r*) Clause 25.
(*s*) [1958] 1 W.L.R. 1092.

of one of the classes so designated will have to be advertised by the applicant. The planning authority will be under a duty to consider any representations received within twenty-one days of the advertisement (*t*).

Third party applications

Clause 30 of the Bill carries into effect a recommendation of the Franks Committee upon a matter which has attracted some public notice, *viz.*, the making of planning applications by persons other than the owner.

Where an applicant is the sole owner of the land included in the application, he will have to give a certificate to this effect. If a person is not sole owner there are two alternative procedures open to him. Either:

(a) he must notify all other persons who are owners of any of the land. Changes of ownership occurring within three weeks of the date of the application can be disregarded; *or*

(b) he must advertise the application. This advertisement may be coupled with direct notice to those owners he knows about. And an agricultural tenant must always receive individual notification, because the grant of planning permission can affect his security of tenure.

Whichever course he adopts, the applicant must provide the local planning authority with a certificate, which has to contain a good deal of detailed information.

An owner is protected by the requirement that the planning authority shall not determine the application for twenty-one days after the date of the service of the last individual notice or the date of the advertisement, whichever is later.

The same procedure will apply to planning appeals (*u*).

"Owner" means (a) the freeholder, or (b) a tenant for a term of years certain with at least ten years remaining unexpired, or (c) an agricultural tenant.

IV.—Miscellaneous Provisions

Purchase notices by resident owner-occupier

The most important provision in Part IV is that which aims to give a measure of relief to those houseowners who have found their properties virtually unsaleable as a result of provisions in a development plan—what has sometimes been called "planning blight."

(*t*) Clause 29.
(*u*) Clause 30.

A resident owner-occupier who has made reasonable efforts to sell since the operative date of the plan or scheme and has, as a result of the planning provisions, been unable to do so, except at a substantially reduced price, may force the appropriate authority to acquire his interest.

The clause lists the classes of planning provision which will give rise to the right to force a sale. Examples of these classes are:

(a) land may be designated in a plan as subject to compulsory acquisition, *e.g.*, as a civic centre;

(b) land may be shown as the site of a new school or a new road. In the case of roads, the line on the plan is "diagrammatic." If the authority can show that the line has been fixed and no longer affects the property, the owner's claim will be defeated. The line must, however, be fixed in one of the ways mentioned in the Fifth Schedule, paragraph 4 (2), *e.g.*, by a new "middle of the road" line approved by the Ministry of Transport (usually after a public inquiry) under the Restriction of Ribbon Development Act, 1935.

An authority who wish to object to purchase can do so by a counter-notice on certain defined grounds. They must do so within two months or the notice takes effect, and the authority will then be in the position of having served a notice to treat from which they cannot withdraw. A disputed counter-notice will be settled by the Lands Tribunal.

An owner may have second thoughts, because he is entitled to withdraw up to six weeks after the compensation is settled (*a*). The compensation payable will not include anything for severance or disturbance, unless severance of agricultural land is involved.

Those owners who are given a right to "unload" their properties are individuals who occupy as a private dwelling the whole or part of a property earmarked for future acquisition, and enjoy either a freehold interest or a tenancy for a term of years certain of which not less than three remain unexpired: there are special provisions for property which is unoccupied, provided that it has not been empty for more than six months prior to the notice (*b*). The authority may have to acquire trade premises if they are occupied with a residence, the whole forming but one entry in the rate book, *e.g.*, a shop and flat over, rated together.

Discretionary powers to buy

The Government hope that where the limited provisions of

(*a*) Fifth Schedule, para. 6. (*b*) Clause 31 (6) (*b*).

clause 31 would not assist an owner and hardship would occur, local authorities will exercise their existing discretionary powers. To encourage this, clause 36 provides for grants from the Ministry of Transport to highway authorities towards the cost of acquisition and maintenance of properties required for future schemes.

Damage to requisitioned land

At present, compensation for damage to requisitioned land is limited by section 53 of the Act of 1954 to the price the land would have fetched on compulsory acquisition if it had been in its pre-requisition state. This "ceiling" is removed—a little late no doubt—by clause 32. Where land is de-requisitioned after October 29, 1958, the compensation for damage will be the difference between (a) the market value of the land in its damaged state, and (b) the market value of the land in its pre-requisition state.

Repeals and date of operation

Amongst the repeals in the Bill is Part III of the Town and Country Planning Act, 1954. It will no longer, therefore, be possible to make an inquiry of a local authority under section 33 of the Act of 1954, whether they have any intention to acquire the property compulsorily. This procedure will be well known to conveyancers.

THE PARTIAL REVOCATION OF WILLS

By A. Kiralfy, Barrister-at-Law

A number of testamentary documents may be admitted to probate, such as " concurrent " wills disposing of distinct parts of an estate, or " successive " wills and codicils of various dates, provided all these documents have some testamentary effect. However, in dealing with revocation of wills, the books generally give the impression that " the will " is being revoked. Again, wills contain a number of different dispositive provisions, and any one of these may be revoked separately. This is well recognised in practice but the books do not always make it clear to the student or non-specialist. Professor Bailey's work on Wills draws attention to partial revocation in several cases, but not all. The larger works do not make the point clear. Indexes do not contain references to partial revocation. It is the object of the present article to try to marshal the very clear case-law on this subject, for easier comprehension.

Revocation of a will requires the same testamentary capacity as the execution of a will. The books deal exhaustively with a capacity to make wills but only refer to the subject indirectly under " intention to revoke " which is really a different matter. It is possible to have capacity to revoke one part of a will but not another. This is shown by the well-known case of *In the Estate of Bohrmann* (*a*). In this case the testator made bequests to English charities by a will executed in 1926. He was involved in a dispute with the London County Council, who wanted to buy his home as the site for a hospital, and developed a persecution complex. In 1932 he executed a codicil providing that American charities should benefit instead of the English charities. The court held that he was under a delusion limited to one point and this affected his mind so that his revocation of the bequests to English charities was ineffective.

Express revocation is common in practice, *e.g.*, revocation of one codicil without revoking the rest of the documents, or revocation of a bequest in an earlier will by a specific revocation or substitution in a later will or codicil. This is a matter of construction, but it may raise consequential problems, *e.g.*, where a testator

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(*a*) [1938] 1 All E.R. 271, especially at pp. 276, 281, 282.

revokes part of a joint or common gift. One example may be given. It was held by the Court of Appeal in *Re Palmer* (*b*) that the revocation of a gift of a distinct share of residue must generally be treated as leaving the share undisposed of, to pass on intestacy, though the later exclusion of a member from a class gift will operate to cause his share to accrue to the other members of the class. In *Re Wilkins* (*c*) the testator made a will in 1907 leaving the residue of his estate to his five children in equal shares. In 1914 one of the children, H, became bankrupt. In 1915 the testator, by codicil, revoked the gift to H, but provided that the residuary estate should be divided among the children "entitled to the same." This was held to vary the usual rule, and the other four children therefore took the whole of the residue.

Where a later testamentary document does not contain a revocation clause, it only revokes earlier wills to the extent of inconsistency. This is a well-known rule, but is generally assumed to refer to changes in amounts given to the same legatee and matters of that kind. In most of the cases, however, the issue has in fact been the lack of a residuary gift in the later document, and the courts have been able to prevent intestacy by admitting both or all documents to probate. The leading case is *Lemage* v. *Goodban* (*d*). Here the testator's first will gave "all" his estate and "all" he possessed, subject to certain bequests, to his sister R. His second will, described as his last will, followed similar lines to the first but only gave R "all my money." It was held that "last will" did not amount to an express revocation and that the residuary gift in the first will stood. In *In bonis Griffith* (*e*) the testator left two wills, inconsistent in most of their provisions, and both described as his last will. One of the wills, apparently earlier than the other, appointed an executor; the other did not. The interested parties consented to a grant of probate to the executor. We are not told how the dispositions were carried out, but no doubt the parties agreed on these also. If a later document deals with part of the estate only, *e.g.*, personal property, the dispositions of the earlier will over the rest of the estate are unaffected (*f*). *In bonis Petchell* (*g*) shows that the same principle applies to dispositions of limited interests in the same property. The testatrix's first will left the bulk of her estate to her daughter Ann absolutely, and made her

(*b*) [1893] 3 Ch. 369, at p. 372.
(*c*) [1920] 2 Ch. 63.
(*d*) (1865) L.R. 1 P. & D. 57.
(*e*) (1872) L.R. 2 P. & D. 457.
(*f*) *In b. Hartley* (1880) 50 L.J.P. 1; *Simpson* v. *Foxon* [1907] P. 54.
(*g*) (1874) L.R. 3 P. & D. 153.

residuary legatee. She then executed a second will without a revocation clause and without any residuary bequest, cutting down Ann's interest to a life interest and providing for several legacies to other persons. It was held that both wills should be proved and that Ann was still entitled to the property absolutely, on paying the legacies referred to. In *In bonis Hodgkinson* (*h*) a testator executed a first will disposing of all his property. He then made a second will disposing of his real property only, which in fact constituted the bulk of his estate. He then revoked the second will by destruction. The court held that the first will had never entirely lost its force, and, presumably since the destruction of the second will removed any possible "inconsistency," the first will was effective and should be admitted to probate (*i*). With this may be contrasted *Re Murray* (*j*). Here the testator's will, made in 1951, imposed a strict name and arms clause, to assume and continue to bear a certain name. In 1952 he executed a codicil which revoked this and substituted a less stringent clause, to assume the name only (the headnote to the report is incorrect). The Court of Appeal held the later clause to be invalid for uncertainty. Harman J. now held that the clause in the 1951 will had been finally and unconditionally revoked and did not revive, so that both clauses failed.

The doctrine of dependent relative revocation or conditional revocation applies to parts of a will, as much as to the revocation of an entire will. A good example is *In bonis Hope Brown* (*k*). The testator made a will in 1934, conferring a life interest in his property on his wife, and disposing of the estate on her death. In 1939 he made a new will, again giving the wife a life interest, but he left a blank space for the beneficiaries who were to take after her. It was held that both wills should be admitted to probate, and that the gift over under the first will was still effective. There was an express revocation in 1939 but it was clear that the testator intended to make a substituted gift over and had failed to do so, so that the revocation of the first gift over could be regarded as conditional. In *Re McCabe* (*l*) the testator made a bequest to Edith. Later he erased the name of Edith and substituted that of Louisa, but this was not attested. It was held that his revocation of the gift to Edith had been conditional on the substitution being effective, and therefore the gift to Edith of which evidence could be given, stood. The same principle applies if the legatee is the same

(*h*) (1893) 69 L.T. 150.

(*i*) The effect of the second will was to take the real property out of the residuary gift in the first will. The revocation of the second will did not have the effect of putting the realty back in the residuary gift.

(*j*) [1956] 2 All E.R. 553.

(*k*) [1942] P. 136.

(*l*) (1873) 3 P. & D. 94.

but the amount is changed, as in *Re Itter* (*m*), where a paper had been pasted over the amount of a legacy but the substitution of a fresh legacy was unattested, and the court held that evidence was admissible to show what the original gift had been.

Whether destruction of part of a will destroys the whole depends on the circumstances. As a general rule the destruction operates, under section 20 of the Wills Act, 1837, as a revocation only of the part destroyed. In *Clarke* v. *Scripps* (*n*) the testator's will consisted of seven sheets, each signed and attested. He later cut off parts of two sheets and all the signatures except the last. The will was admitted to probate; it was still signed and attested at the end, so as to satisfy the provisions of the Wills Act as to formalities, and it was not clear that the testator meant to do more than revoke by destruction what he had in fact destroyed. In *In bonis Woodward* (*o*) a few lines at the beginning of a will had been torn off. It was held that only those lines had been revoked by destruction. In *In bonis Maley* (*p*) the testator cut out of the will the clause appointing an executor and it was held that only that appointment was revoked. In *In bonis Leach* (*q*) the testatrix cut out each reference to a Mr. Pilkington in her will. He in fact took no benefits under it. It was held that the will was unrevoked. The best case is the latest, *In the Estate of Nunn* (*r*). There the testatrix cut a piece of paper from the middle of a sheet of her will and then stitched the sheet together with thread. It was held, following *In bonis Woodward* (*s*), that the missing part of the will was revoked, including any beneficial dispositions it might have contained, and that the rest of the will remained valid. The order was consented to, and the evidence suggested that the part excised had not been dispositive, but the principle appears to be too clearly established for there to be any serious doubt.

We now come to a set of cases in which a partial destruction has been held to revoke the entire will. There are two cases in 1858, both based on a presumed intention of the testator. In *Williams* v. *Tyley* (*t*) the will consisted of five sheets, each signed. In the clause at the end of the will the testator referred to his having signed each sheet. He later tore off the signatures under the first four pages, and struck through the signature of the last with a pen.

(*m*) [1950] P. 130.
(*n*) (1856) 2 Rob.Eccl. 563.
(*o*) (1871) 2 P. & D. 206.
(*p*) (1887) 12 P.D. 134.
(*q*) (1890) 63 L.T. 111.
(*r*) (1936) 154 L.T. 498.
(*s*) *Supra.*
(*t*) (1858) Johns. 530; 123 R.R. 223.

The last alteration would not have revoked the will by itself but the court held that the testator had regarded all the signatures as part of his signature and had, by tearing off most of them, revoked the entire will, the signature at the end being limited in its effect, apparently, to the original state of the will.

The other contemporary case is *In bonis Gullan* (*u*). There a testator prepared a will of six or seven sheets and each sheet was signed and attested. Pages three and four were found at his death, but the others were missing. Applying the usual presumption, the missing pages were treated as revoked by intentional destruction, including the last sheet whose signature alone was " at the end " for the purposes of the Wills Act. Parts of pages three and four were intelligible, but other parts were unintelligible without information from the missing pages. It was held that the two surviving pages did not constitute a self-contained will, and that the signatures and attestations on these, not having originally been at the end of the will, could not now be treated as at the end simply because the later pages were missing. The entire will was therefore revoked. A very interesting later case was *Leonard* v. *Leonard* (*a*). The first will contained five sheets and was duly signed and attested. Later the testator destroyed the first two of the sheets and substituted two new sheets, each of which was signed and attested. Unfortunately the last three sheets were not now completely intelligible. The court held that the new sheets had only been signed to authenticate them and not so as to be a complete will, that the rest of the will did not make sense with them, that the original signature at the end of the whole will was therefore of no effect and that the new signatures were in no sense signatures at the end of the will. One can, of course, well imagine that in other circumstances the new sheets might have been treated as a codicil, but the case is a lesson not to play about with wills without fully studying the consequences.

Although section 21 of the Wills Act does not refer to it as revocation, a complete obliteration of a gift by will, even though unattested, will work a revocation of the gift (subject to the doctrine of dependent relative revocation already referred to). In *In bonis Gosling* (*b*) a short codicil was written on the back of one of the sheets of a will and duly signed and attested. Later the testator completely obliterated the codicil but did not touch the rest of the will. It was held that the codicil failed. The reporter refers to this as revocation by obliteration. In *Ffinch* v. *Combe* (*c*) the President

(*u*) (1858) 27 L.J.P. 15.
(*a*) [1902] P. 243.
(*b*) (1886) 11 P.D. 79.
(*c*) [1894] P. 191, at p. 198.

referred to an effective alteration of a will as a partial revocation. A more recent case is *In the Estate of Hamer* (*d*). Here the testator by his will gave a legatee £250. Later he completely obliterated the words "two hundred and-" and it was held that the legatee could only claim £50. The doctrine of dependent relative revocation had no bearing on this case, since the obliteration was effective, though unattested, and the testator had not attempted to introduce any fresh unattested words.

One may conclude from the case-law on all these topics that the whole subject of revocation must be approached from the point of view of each disposition in each document which is claimed to be affected. With a few reservations as to findings of fact by judges, it may also be asserted that the law is completely logical and sensible. The underlying theory is not always so clear; there is some conflict between the emphasis on the documents which the testator regarded as his will and on the actually effective dispositions which a court construes him as having made, but this is a much wider topic, not limited to partial revocation, and one which does not seem to cause practical problems. A fairly wide discretion is left to the court and the use which it makes of it has generally been beneficial.

(*d*) (1943) 60 T.L.R. 168.

ON MAKING THE MOST OF LAND REGISTRATION

By Theodore B. F. Ruoff, Solicitor

At first sight the title might suggest that this is yet another of those articles in which the writer, with stiff upper lip, begins by telling his readers that the expansion of the registration system is inevitable, and that they must learn to adjust themselves to that position. Yet it should be observed that the words used are, " On making the *most*," not " On making the *best* "; for the purpose of this article is to throw out, almost at random, a variety of suggestions for improving the quality of applications made to the Land Registry. In case the reader senses an implied rebuke in these words, let it be said at once that if the two sub-headings next following (which are entitled " Common Errors " and " Bad Plans ") contain an element of fault-finding, the rest of the article does not. There are today many solicitors up and down the country who are faced with practising under the registration system without the advantage of having had any considerable practical experience of it and this article is specially aimed at helping them to avoid some unsuspected pitfalls and a number of unrewarding by-paths and, in general, at assisting them to their destination by the best and shortest route.

Common Errors

It is no flattery to assert that any practitioner who takes the trouble to read this learned journal is the very last person who would ever fall into the recurrent errors and omissions which beset the Land Registry in their tens of thousands a year. It is, perhaps, not so improbable that junior members of the reader's staff are entirely blameless—whether or not they are depends upon the degree of supervision and control that the principals in each firm exercise. These exceedingly common mistakes are all described in a booklet on Land Registry Practice which was commended to the profession by the President of the Law Society (*a*). One unhappy feature about them is that each one of them causes the Registry, on average, three times as much time and effort as an application which is lodged in proper order and this squandering of manpower is

(*a*) *Land Registry Practice.* Notes for the Guidance of Solicitors and their Clerks, with an Introduction by Sir Ian D. Yeaman.

inevitably reflected in the delays for which at present the Registry alone is blamed. In addition, the consequential requisitions by the Registry dealing with these errors or omissions similarly result in much wasteful work in solicitors' offices. Therefore a wider dissemination and a close study of the booklet referred to above cannot fail to prove beneficial.

Bad Plans

Plans are not dealt with in the practice booklet and deserve a brief comment. The other day a senior member of the Council of the Law Society wrote that "it is the excellence of the plans produced by the Land Registry which . . . gives the land certificate its most striking advantage over the conventional conveyance. For while in most cases the plans attached to conventional conveyances give no cause for complaint, this is not always so; and on occasion the plans are quite deplorable" (*b*).

Had the present writer used the word "deplorable" he might have been suspected of adopting hyperbole. Yet what other word is apt to describe plans which, even if used for purposes of identification only, depict the land purchased as lying 150 feet away from the site actually bought and occupied by the purchaser, plans which omit nearly half an acre of garden, or plans of vacant plots which show no permanent features and contain no fixing dimensions as a primary clue to the whereabouts of the land transferred? Indeed many plans relating to established dwelling-houses—particularly plans on leases—fail to show where the property is situated. However, when, in the past, the Registry has tried, for the sake of being businesslike, to give a realistic effect to the obvious intentions of the parties, it has suffered criticism from the Court of Appeal. This is exactly what happened in the unfortunate case of *Lee* v. *Barry* (*c*), in which, after three separate and careful surveys, each of which revealed a plot bounded by surveyor's pegs, which was of quite a different shape from that shown on the transfer plan, the Registry endeavoured to cure the defective deed plan by preparing the official plan to accord with the plain facts on the ground. The court nevertheless declared in favour of the plan drawn on the transfer although it was in direct conflict with the situation established by survey. Since then it has become necessary for the Registry to be more strict in its acceptance of

(*b*) "Registered Land Conveyancing: The Arguments for and against the System Reconsidered," by R. J. F. Burrows. *Law Society's Gazette*, February, 1959, at p. 85.

(*c*) [1957] Ch. 251.

doubtful plans, although the execution of a formal deed of rectification (such as would be indispensable in unregistered conveyancing) is still avoided in almost all cases. Thus at present:

(i) If the boundaries shown on a deed plan do not agree with the known and defined boundaries on the ground, either the plan or the boundaries themselves may have to be altered so that the two correspond.

(ii) If there are no physical features (such as proper boundary posts, or fences or walls) on the site, the deed plan will be treated as the governing factor even though ultimately it turns out to be an inaccurate representation of the intended bargain.

(iii) If a plan is so ambiguous or otherwise defective that it cannot be understood, either the application to which it relates will be cancelled, or the proposed official plan must be approved by all interested parties.

In any case in which a plan is altered, or approved, or substituted, it must bear a statement, signed by all parties concerned, that it, and not the original deed plan, correctly represents the intentions of the parties.

Developing Building Estates

Whilst on the subject of plans, reference may be made to the special facilities which are offered to solicitors who act for the developers of building estates. Close co-operation between them and the Land Registry Plans Branch is welcomed. About one month before the first transfer of part of the estate is likely to be lodged for registration the solicitor acting for the vendor should send to the Registry two copies of the layout plan with a view to its being approved for use in making official searches of the register. These plans must show plot or other reference numbers and the extent of each individual plot should be clearly defined. After the plans have been approved by the Registry one copy will be retained, the other being returned to the vendor's solicitor. Thereafter all applications for official searches of the register in form 94B may describe the land in respect of which the search is made by reference to the plot number on the officially approved layout plan, so saving applicants the cost and trouble of providing separate plans to accompany each application.

All Land Registry plans are based on the Ordnance Survey map (*d*) and in the case of building estates they are usually of a scale of 104·16 feet to one inch (1/1250). Surveys of developing estates are made at frequent intervals and the Registry's plans are

(*d*) Land Registration Rules, 1925, r. 272.

revised to show all new buildings, fences, roads and other physical features. The registration of transfers is facilitated if, when the layout plan is lodged for approval, the vendor's solicitor notifies the Registry of the areas in which new roads are being laid out and development is proceeding. The Registry should again be notified when fresh roads are being constructed and fences or other boundary structures are being erected. It is essential that any alteration in the layout plan should be reported immediately by the vendor's solicitor to the Registry.

For various reasons it is not possible to extend the use of a layout plan (by reference) to the actual transfers themselves. Each instrument of transfer of part should have annexed to it a plan of the property transferred and this plan may be drawn to any convenient scale between 40 feet to one inch and 104·16 feet to one inch (1/1250). It should, of course, show not only the land being transferred but also sufficient adjacent detail to enable the position of the plot to be identified on the plan in the vendor's land certificate. If the land certificate plan does not show the boundaries of the plot by firm lines, this means that fences were not in existence when the Registry last surveyed the property and in any such case the transfer plan must provide figured dimensions tying the position of the plot to the nearest road junction or other physical features shown on the land certificate plan. In addition, the dimensions of the plot itself should be shown.

On rapidly developing estates the land certificate will be deposited at the Registry for the registration of sales of plots and in consequence it will not be available in the hands of the vendor for inspection by purchasers. To remove any difficulty so arising the Registry issues to the vendor's solicitor, on request (form A44), at cost price, office copies of the register. He can thus hand one of these to each purchaser and, not only is his client saved the expense of preparing copies of the entries in the register, but purchasers are spared the trouble of verifying them, because office copies are admissible in evidence in all matters and between all parties to the same extent as the originals (*e*). It is then only necessary for a purchaser's solicitor to satisfy himself that the plot in which he is interested still remains within the vendor's title and that no adverse entry affecting it has been made since the date of the issue of the office copy by the Registry. This he does by applying by post for a free official search in form 94B. The official certificate of the result of the search gives priority over any adverse dealing until the morning of the fifteenth working day after its date. Taking account of

(*e*) Land Registration Act, 1925, s. 113.

Saturdays and Sundays, which are not working days, this means that the period of priority is actually 18 days. In order to ensure that purchasers' solicitors adopt this procedure uniformly the vendor's solicitor may supply them with prints of form 94B when giving them authority to inspect the register.

Forms of Instruments

A solicitor who has grown up under the unregistered system is prone, when he turns to registered conveyancing, to embroider it with unnecessary frills. This is an understandable tendency but one to be resisted because—to change the metaphor—matters which are natural growths in unregistered conveyancing are excrescences under land registration. One or two common examples appear hereafter. First, however, let it be said that it is always preferable to use the statutory forms (many of which are printed and obtainable from H.M. Stationery Office) in their stark simplicity whenever possible. Indeed, it is essential to use them in the circumstances to which they are applicable (*f*) and a failure to do so may well result in the rejection of applications when they are lodged at the Registry. When, however, the practitioner has to deal with a transaction which no existing form exactly fits, or to which no existing form can conveniently be adapted, departures from the statutory forms are readily permitted by the Chief Land Registrar (*g*) and he is always most willing to peruse a draft deed and to approve it or suggest amendments which will make it acceptable (*h*).

The principle governing instruments under the Land Registration Acts is, in general, that they must not—as is obvious—conflict with the fundamental principles of land registration. Thus all instruments must exhibit no more than the existing state of the title; they must not refer to unregistered instruments, to trusts (*i*), or to entries already on the register, or to the past history of a title. If it appears to the Chief Land Registrar that any instrument or entry proposed to be entered on the register is improper in form or in substance, or is not clearly expressed, or does not indicate with sufficient precision the particular interest or land which it is intended to affect, or refers only to matters which are not the subject of registration, or (being a restriction) is unreasonable or

(*f*) Land Registration Rules, 1925, r. 74. See the remarks of Evershed M.R. in *Morelle, Ltd.* v. *Wakeling* [1955] 2 Q.B. 379, at pp. 414 to 416.

(*g*) Land Registration Rules, 1925, r. 75.

(*h*) The draft should be lodged for approval with a carbon copy and a fee of 5s. An extra fee of 2s. 6d. is payable for the approval of a plan (Land Registration Fee Order, 1930, para. XII (4)).

(*i*) See, *e.g.*, the Land Registration Act, 1925, s. 74.

calculated to cause inconvenience (*k*), he may decline to enter it on the register, either absolutely or subject to modification (*l*). Occasionally he has had to refuse to accept an ordinary conveyance which a misguided applicant has tried to register in place of a transfer. Moreover, if an instrument contains lengthy recitals or any reference to an unregistered interest, it is liable to be rejected by him.

Powers of Joint Proprietors

When, in unregistered conveyancing, land is conveyed to trustees for sale it is a common and proper practice to include a clause in the conveyance to the effect that, pending the sale of the whole of the property, the trustees for sale for the time being of the unsold part of it shall have the same full and unrestricted power of mortgaging it for any purpose and of leasing or otherwise dealing with it in all respects as if they were an absolute owner. In the absence of such a clause the trustees have the powers of a tenant for life combined with those of the trustees of a settlement, but not the full powers of an absolute beneficial owner (*m*). But the position in registered conveyancing is radically different and to import a clause of this kind into a transfer of registered land is worthless verbiage. The reason is simple. The proprietors of registered land invariably enjoy full and unrestricted powers of disposition *unless* there is some entry to the contrary on the register curtailing those powers (*n*), so that the limitations governing the powers of trustees for sale of unregistered land have no application to them. Furthermore, the modern form of the obligatory restriction in form 62 against a sole trustee-proprietor giving receipts for capital money (*o*) in no way detracts from the plenary powers of disposition of registered proprietors. The position is thus the reverse of that in unregistered conveyancing and, if the parties wish to whittle down the powers of trustees for sale of registered land to the level of those enjoyed by their unregistered counterparts, they must expressly apply for a restriction for the purpose. It is, however, unlikely that they will normally wish to do so.

Appurtenances

Conveyances of unregistered land often contain a clause of some considerable length, the purport of which is that the assurance to

(*k*) *Ibid.*, s. 58 (2).
(*l*) Land Registration Rules, 1925, r. 78.
(*m*) Law of Property Act, 1925, s. 28.
(*n*) Land Registration Act, 1925, ss. 18, 21 and 25.
(*o*) *Ibid.*, s. 58 (3); Land Registration Rules, 1925, r. 213; Sched., form 62.

the purchaser includes all such rights, easements, quasi-easements and privileges, of which many are exemplified, as have previously been enjoyed, just as if the land conveyed and the adjoining land had formerly belonged to different owners. Has anyone been able to track this clause down to any book of precedents? Be that as it may, a clause of this kind may be valuable in unregistered conveyancing, although only too often the whole tower of its strength is made to totter by the addition of the words "(if any)." Yet if clauses of this kind are introduced into registered instruments they are useless, and consequently wasteful. There are a number of reasons, of which two may be given. First, it is provided that if, before the registration of any interest in land with an absolute or good leasehold title, any easement, right or privilege has been acquired for its benefit, then, on registration, the easement, right, or privilege shall (subject to any entry to the contrary on the register) become appurtenant to the registered land as if it had been granted to the proprietor (*p*). Secondly, it is provided that the registration of a person as the proprietor of land shall vest in him all rights, privileges, and appurtenances appertaining or reputed to appertain to the land or any part of it, demised, occupied, or enjoyed with it, or reputed or known as part or parcel of or appurtenant to it, or any part of it, including the rights and interests which would have passed with the conveyance in unregistered conveyancing (*q*). Therefore if useless repetitive clauses to the same effect are incorporated in a transfer they are not entered on the register of title.

Acknowledgments for Production

There are three obligations imposed by an acknowledgment for production. These are: (1) to allow the inspection of earlier deeds and their comparison with an abstract; (2) to prove or support the title of the person entitled to production; and (3) to deliver copies of documents (*r*). It is clear that, by their very nature, these obligations cannot apply to freehold land registered with an absolute title or (with the one exception mentioned hereafter) to leasehold land registered with an absolute or good leasehold title. But it may well be asked, should a grant of probate or of letters of administration be the subject of an acknowledgment for production in registered conveyancing? If the personal representative has already been himself registered, his title needs no further proof than the register itself

(*p*) Land Registration Act, 1925, s. 72.
(*q*) Land Registration Rules, 1925, r. 251. See the Law of Property Act, 1925, s. 62.
(*r*) Law of Property Act, 1925, s. 64 (4).

affords, because the grant has ceased to be a link in his title (*s*) which, thenceforth, no longer depends on the grant, but upon the state of the register. Is an acknowledgment necessary when the personal representative assents (*t*) without first being registered himself? When the assent is delivered for registration it is required to be accompanied by the grant (*u*), so that a personal representative who refused to deposit the grant at the Registry to enable the assent to be registered would be derogating from his assent. Indeed, he could be made to produce the grant whether or not he had given an acknowledgment previously. Again, a personal representative who sells land can be compelled to get himself registered before completion (*a*), and when once the transferee has been registered as proprietor, the grant no longer forms any part of his title. For these reasons an acknowledgment for the production of documents in a transfer or other disposition of registered property is normally useless because, once a deed has been completed by the process of registration, it no longer forms any part of the title.

There are two common exceptions. First, when a registered title is merely possessory, an acknowledgment should be obtained in respect of any pre-registration deeds for which it would be obtained in like circumstances in unregistered conveyancing. Secondly, an acknowledgment should be given in respect of a lease of which the title is registered when a part of the demised premises is disposed of, for the simple reason that the original lease is, and always remains, an essential part of the lessee's title.

Personal Searches

Other excrescences relate to method rather than form. Much time, effort and money are wasted in making unnecessary searches of various kinds. First, there is the personal search. When the Land Registration Rules became law the modern official search procedure had not been invented and personal searches (*b*) before completion (which often took place in the Registry itself) were customary. But with the introduction of official searches (*c*), personal searches might well have been expected to have become extinct for almost all purposes. It is true that there are rare situations (unconnected with any purchase, mortgage or lease) in which someone may wish to make a personal search, but they do

(*s*) *Cf. Re Miller and Pickersgill's Contract* [1931] 1 Ch. 311.
(*t*) Under the Land Registration Rules, 1925, r. 170.
(*u*) *Ibid.*, r. 170 (4).
(*a*) Land Registration Act, 1925, s. 110 (5).
(*b*) Under the Land Registration Rules, 1925, r. 287.
(*c*) Under the Land Registration Rules, 1930 and 1936.

not account for the 16,378 personal searches which were made in 1957–58 (*d*). Indeed, in order to appreciate the utter futility of most personal searches that are made it is only necessary to visit the public search counter at the Registry on almost any working day and there observe clerks tediously comparing a typewritten abstract with the register, or, worse still, laboriously copying out, word by word, an entire register, including the whole contents of a schedule of restrictive covenants. Surely the clerk's time so spent is far more costly to his firm than the sum of 1s. 6d. spent on obtaining an office copy of the register? The arguments in favour of using an official search are too well known to be repeated at length. It suffices to say that official searches may be made by post from any part of the country, that they are authoritative, that they take cognisance of all dealings pending in the Registry, that they have the backing of the Land Registry insurance fund (*e*), that they exonerate a solicitor from responsibility for error (*f*), and that they secure special priority for purchasers, chargees and lessees (*g*). A personal search does none of these things and a purchaser's solicitor who relies on one takes a serious risk for should any mistake be made by him or his clerk, he would unquestionably be liable in negligence.

Land Charges Searches

It is known that a great number of searches are made every year at the Land Charges Department at Kidbrooke in relation to registered land. These are certainly necessary in regard to those few titles which are still registered as possessory or qualified, as to which the pre-registration title must be investigated in accordance with the customary practice of unregistered conveyancing. But they are never justified in relation to an absolute title. Perhaps the solicitors who make them are allowing themselves to be influenced by some unfortunate remarks, made *obiter* in one case, by Sir Raymond Evershed M.R., when he suggested that a sub-contract cannot be protected by a caution or notice on the register of title and went on to say: "If it is not so capable of protection under the Land Registration Act, it continues to be covered by the Land Charges Act. In other words it is quite plain that the Land Charges Act is not wholly excluded *quoad* registered land" (*h*).

(*d*) The Chief Land Registrar's Report on H.M. Land Registry for 1957–58, p. 7.

(*e*) Land Registration Act, 1925, s. 83 (3).

(*f*) Land Registration Rules, 1925, r. 295.

(*g*) Land Registration Rules, 1930 and 1936.

(*h*) *City Permanent Building Society* v. *Miller* [1952] 2 All E.R. 621, C.A., at p. 626.

Unhappily, he was doubly wrong. Sub-contracts may be, and regularly are, protected on the register, whenever the ultimate purchaser or lessee establishes, in his application, the link between his vendor or lessor and the registered proprietor. As to the main point, however, there are many provisions in the Land Registration Act which unquestionably prove that (except in regard to local land charges) the register of title is self-contained, and consequently excludes the Land Charges Act, 1925. In the first place there are plain statements that a proprietor who is registered with an absolute title after a purchase holds subject to the incumbrances and other entries appearing on the register and to such overriding interests as there may be, but free from all other estates and interests (*i*). Secondly, every instrument, charge or matter which, in unregistered conveyancing, is registrable under the Land Charges Act has, under the Land Registration Act, at least one comparable method of protection (*k*). The provisions of the Land Charges Act confirm this position (*l*). Thirdly, the Land Registration Act categorically states that a " purchaser shall not, by reason of the registration, be affected with notice of any pending action, writ, order, deed of arrangement or land charge (other than a local land charge) . . . which can be protected under this Act by lodging or registering a creditor's notice, restriction, inhibition, caution or other notice, or be concerned to make any search therefor if and so far as they affect registered land " (*m*). Lastly (subject to exceptions that are not here germane) the Act provides that " a purchaser acquiring title under a registered disposition, shall not be concerned with any pending action, writ, order, deed of arrangement, or other document, matter, or claim (not being an overriding interest) which is not protected by a caution or other entry on the register, whether he has or has not notice thereof, express, implied, or constructive " (*n*). It is thus abundantly clear that the Land Charges Act is excluded *quoad* registered property.

Searches in the Companies Registry

Another type of search which is often made unnecessarily is a search in the Companies Registry at Bush House for incumbrances created by a limited company which is registered as a proprietor

(*i*) Land Registration Act, 1925, ss. 5, 20 (1), and 23 (1).
(*k*) *Ibid.*, ss. 59 (1), 59 (2).
(*l*) Land Charges Act, 1925, s. 23 (1).
(*m*) Land Registration Act, 1925, s. 110 (7). For a table showing the precise relationship between the Land Charges Act and the Land Registration Act in this connection, see 17 Conv.(N.S.) 122 (repeated in Curtis and Ruoff's *Registered Conveyancing*, at p. 734).
(*n*) Land Registration Act, 1925, s. 59 (6).

under the Land Registration Act. Again, the question rests upon the fact that the register of title is self-contained. The Act provides that "Where a company, registered under the Companies (Consolidation) Act, 1908, is registered as proprietor of any estate or charge already registered, the registrar shall not be concerned with any mortgage, charge, debenture, debenture stock, trust deed for securing the same, or other incumbrance, created or issued by the company, whether or not registered under that Act, unless the same is registered or protected by caution or otherwise under this Act" (*o*).

It is true that this wording is not as precise as it might be. The state of the law would, perhaps, have been a little clearer if the parliamentary draftsman had written (as he undoubtedly meant): "Where a company . . . is registered as proprietor of any estate in, or any charge upon, land already registered. . . ." Nevertheless, the intent seems to be that when a company buys registered land, or when it lends money on the security of registered land, the registry is not concerned with any of the incumbrances above described which have been created or issued by the company. It is immaterial that any of them may have been registered at the Companies Registry, for, unless they are actually registered as charges on the register of title or protected on the register by a caution, notice or restriction, neither the Chief Land Registrar, nor a purchaser, nor a borrower, is concerned with them. Furthermore, no indemnity is payable out of the Land Registry Insurance fund to a company's creditors because a purchaser or borrower acquires an interest under a registered disposition free from an incumbrance of any of the kinds mentioned from a company-proprietor (*p*). To search at the Companies Registry for the purpose of uncovering incumbrances is therefore unnecessary.

Searches of the Public Index Map

Many of the foregoing remarks relate to things done which ought not to have been done. It is now time to consider briefly things left undone. Although, in these several ways, a great deal of unnecessary searching is indulged in, it is surprising what scant attention is given to the facilities for making an official search of the public index map at the Registry. This omission is customarily referred to by the Chief Land Registrar in his annual Report to the Lord Chancellor and last year he disclosed that only 8,566 such searches were made, although 40,761 applications for first

(*o*) *Ibid.*, s. 60 (1).
(*p*) *Ibid.*, s. 60 (2).

registration were received (*q*). Searches of this map provide the only possible means of ascertaining whether land which appears to be unregistered is in fact so and every proposing purchaser or lessee of land (at least in the compulsory areas) is wise if he makes an official search (*r*). Other things which are sometimes left undone follow.

First Registration of Dispositionary Leases

The fact that a lessee may be under an obligation to register his title to a lease of land situated in a non-compulsory area seldom fails to surprise newcomers to the registration system. Yet such is the case if the lease in question happens to be a disposition of registered land, and there is nothing illogical or anomalous about this proposition. It has no connection whatever with the rule that on every grant of a term of not less than 40 years, and on every assignment of a term having not less than 40 years to run, affecting land in the compulsory areas, the lessee or assignee is required to apply for first registration (*s*).

The Land Registration Act allows a registered proprietor of land, wherever situated (subject to any entry on the register to the contrary), to grant a lease (*t*) or an underlease (*u*) of his land. Any such disposition must, in order to be legally effective, be completed by registration of the title of the lessee or sub-lessee, just as a transfer is completed by registration. A transfer of a registered estate is completed by the Chief Land Registrar entering on the register the transferee to whom the disposition is made as the proprietor of the estate transferred. Until this has been done the transferor is deemed to remain the proprietor of the registered estate (*a*). The word "transfer" includes any authorised disposition (*b*). In a similar manner, "all interests transferred or created by dispositions by the proprietor, other than a transfer of the registered estate in the land, or part thereof, shall, subject to the provision relating to mortgages, be completed by registration in the same manner and with the same effect as provided by this Act with respect to transfers of registered estates and notice thereof shall also be noted on the register" (*c*). Furthermore, "every such disposition shall,

(*q*) The Chief Land Registrar's Report on H.M. Land Registry for 1957–58, pp. 2 and 5.

(*r*) Under the Land Registration Rules, 1925, r. 286. The form is No. 96 and no fee is now charged in any area (Fee under the Land Registration Fee Order, 1930, para. XII (6) (*a*) waived).

(*s*) Land Registration Act, 1925, s. 123 (1).

(*t*) *Ibid.*, s. 18 (1) (e).

(*u*) *Ibid.*, s. 21 (1) (d).

(*a*) *Ibid.*, ss. 19 (1); 22 (1).

(*b*) *Ibid.*, ss. 18 (5); 21 (5).

(*c*) *Ibid.*, ss. 19 (2); 22 (2).

when registered, take effect as a registered disposition " (*d*). Completion by registration involves two processes. First, the substantive registration of the title of the lessee. Secondly, the entry of notice of the burden of the lease against the lessor's title.

When the lessee, having previously arranged with his lessor to deposit at the Registry his land certificate (*e*), applies for first registration, notice of the lease will be entered automatically against the lessor's title without any application being made for that to be done and without fee. The lodgment at the Registry of the lessor's certificate is treated as evidence that he considers the lease to be binding upon him (*f*).

The fact that, until he has applied for first registration, the lessee will not become the legal owner of the leasehold estate (*g*), will not disable him from executing a disposition (such as a transfer, or a charge, or a sub-lease) in favour of some other person (*h*), but, until he is himself actually registered, he will not be able to confer a legal estate upon the disponee (*i*). In the result his leasehold title becomes virtually unmarketable if he does not register.

There are four exceptions to the general rule as to completion of leases by registration. They are:

(1) Leases or sub-leases originally granted (*k*) for a term not exceeding twenty-one years cannot be registered. " Nothing in this subsection shall authorise the registration of a lease granted for a term not exceeding twenty-one years, or require the entry of a notice of such a lease if it is granted at a rent without taking a fine " (*l*). If the term is granted in consideration of a premium, the lease should be noted as an incumbrance against the lessor's title, but if there is no premium the lease is amply protected by virtue of its status as an overriding interest and no other protection is possible (*m*), for it instantly takes effect as if it were a registered disposition (*m*). If a lease in possession and a reversionary lease of the same land to take effect in possession upon, or at any time within one month after, the expiration of the first-mentioned lease are so held that the interest under both terms belongs to the same person in the same right, the leases are deemed to create one

(*d*) *Ibid.* (*e*) *Cf. ibid.*, s. 64 (1) (a).
(*f*) *Cf. ibid.*, s. 48.
(*g*) See *Woolwich Equitable Building Society* v. *Marshall* [1952] Ch. 1, pp. 5 and 6; *Lever Finance, Ltd.* v. *Needleman's Trustee* [1956] 1 Ch. 375.
(*h*) Land Registration Act, 1925, s. 37.
(*i*) *British Maritime Trust* v. *Upsons, Ltd.* [1931] W.N. 7.
(*k*) Section 22 (2) significantly refers to leases " originally granted " whereas s. 19 (2) refers to a lease " granted."
(*l*) Land Registration Act, 1925, s. 19 (2), proviso (a); s. 22 (2).
(*m*) *Ibid.*, s. 70 (1) (k).

continuous term (*n*) so that the lessee may, if he wishes, apply for first registration of the combined terms, although he is not obliged to do so (*o*).

(2) Leases or sub-leases which contain an absolute prohibition against all dealings with the term *inter vivos* cannot be registered (*p*). The reason is not far to seek. One of the main objects of registered conveyancing is to simplify dealings with land. Clearly this object cannot be achieved in the case of an inalienable estate, so that no purpose would be served by allowing registration of the title to it. Any such estate is adequately protected if the lessee applies for the entry of notice of the lease against his lessor's title (*q*), unless the term is one of twenty-one years or less, granted at a rent without taking a fine, in which case, as stated earlier, it is automatically protected as an overriding interest.

(3) A mortgage term cannot be registered whilst a right of redemption subsists (*r*).

(4) An agreement for a lease cannot be registered, for the lessee does not get a legal estate (*s*). The agreement should be protected by notice (*t*).

Absolute Leasehold Title

By habit, solicitors acting for lessees almost invariably apply for first registration with a good leasehold title. When they do so the effect of registration of the lessee's title is the same as in the case of an absolute title (*u*), except that the registration does "not affect or prejudice the enforcement of any estate, right or interest affecting or in derogation of the title of the lessor to grant the lease" (*a*). These provisions are often crudely paraphrased by stating that under a good leasehold title the title of the lessor to grant the lease is not guaranteed. That, however, is only part of the story; it would not, of course, normally occur to anyone other than a proposing mortgagee to doubt that a lease had been properly granted. The position of a proposing lessee of registered land is, as regards the title he may require to be deduced, the same as in unregistered conveyancing. Thus when

(*n*) Land Registration Rules, 1925, r. 47.
(*o*) *Ibid.*
(*p*) Land Registration Act, 1925, s. 8 (2).
(*q*) Under *ibid.*, s. 48.
(*r*) *Ibid.*, s. 19 (2), proviso (b); s. 22 (2), proviso (b).
(*s*) *Ibid.*, s. 8 (1) (b): *cf.* s. 2 (1).
(*t*) Under *ibid.*, s. 49 (1) (c).
(*u*) *Ibid.*, s. 9.
(*a*) Land Registration Act, 1925, s. 10.

a lease is to be granted out of registered freehold or leasehold land, the intending lessee is not entitled to call for the title to the freehold (*b*), and when a sub-lease is to be granted out of a registered leasehold title with a registered leasehold reversion, the intending lessee is not entitled to call for the title to that reversion (*c*). Despite these unreasonable stringencies of the law, it so happens that proposing lessors are often willing, when asked, to waive their statutory rights of withholding title to a greater or lesser extent. Indeed, no prudent lessee would ever agree to pay a premium for a lease unless he was first allowed to inspect his lessor's title over a period of some years and, of course, if the lease is to be mortgaged on being granted it is usually essential for the lessee to bargain for some title to be deduced for the benefit of his mortgagee. However, there is an even more compelling reason to make a proposing lessee pause before taking a lease of registered land without negotiating a special bargain to enable him to inspect the superior title. This arises from the fact that a lessee who derives his title from a registered freeholder or a registered leaseholder is fixed with notice of all restrictive covenants appearing on the registers of those titles (*d*), even though he is not allowed to inspect the registers in question and even though the covenants do not appear on his own register of title, as they never will if he is registered with good leasehold title. The following judicial comment has been made about this situation (*e*): "It appears to me to be clear beyond all doubt that when an incumbrance has been registered on the register it is notice to all persons deriving title from the proprietor, though it may perhaps be a blot, that the lessee, unless he makes some bargain to that effect, is not permitted to inspect the register. The answer is: He is at liberty, if he thinks fit, to make such a bargain and refuse to enter into any contract or lease unless first he obtains the permission of the lessor, who can grant it to him, to inspect the register."

The *Roxburgh* Committee recommended (*f*) that the Land Registration Act should be amended so as to give a prospective lessee or assignee the right to inspect the charges register of the freehold or any superior leasehold title, but it is extremely doubtful

(*b*) Law of Property Act, 1925, s. 44 (2).
(*c*) *Ibid.*, s. 44 (4).
(*d*) Land Registration Act, 1925, s. 50 (2).
(*e*) In *White* v. *Bijou Mansions, Limited* [1937] 1 Ch. 610, at p. 621, *per* Simonds J.: affirmed, [1938] Ch. 351. A lessee of *unregistered* land is in no better position because, although he has actual notice through registration under the provisions of the Land Charges Act, 1925, s. 10, of all restrictive covenants affecting the reversion, he does not know the names of previous estate owners and so cannot make an effectual search of the Land Charges register.
(*f*) Report of Committee on Land Charges (1956, Cmd. 9825), para. 42.

whether, in present circumstances, this proposal will be implemented, for freeholders and head leaseholders who (for example) own a large block of offices, will scarcely welcome such an incursion into their private affairs by a proposing lessee of a single room for a term of fourteen years.

It is also significant that a proposing lessee who fails to bargain for, and obtain, an authority to inspect his lessor's register of title, is precluded from making an official search of the register before completion (*g*).

Although the need for making a special bargain is ordinarily thus unquestionable, a neater solution to the whole problem can be found if the lessor co-operates to aid his lessee to obtain the grant of an absolute leasehold title. If it is granted the Registry will automatically reproduce on the register of the lessee's title all restrictive covenants and other incumbrances which are binding upon the estate of the lessor, and at the same time bind all other interests in the land (*h*). In order to obtain such a title the normal forms of application for good leasehold title should be adapted by substituting a reference to absolute leasehold title for good leasehold title. The evidence needed in support of the application must go to show that the lease being registered was in every respect well granted. This evidence will vary according to whether the superior title or titles are already registered as absolute, or are registered with less than an absolute title, or are unregistered. The remarks that follow apply equally to any title superior to that being granted, whether it be freehold or leasehold, or sub-leasehold. The needed evidence is as follows:

(1) If the lessor is registered with an absolute title the state of his title at the date of the grant of the lease which is to be registered as absolute must be such that he was not then debarred by any restriction, inhibition or any prohibition against alienation from granting the lease and that no charge or mortgage was then registered or noted on the register curtailing his powers of leasing. When requisite, proof of the consent of the incumbrancer to the granting of the lease must be supplied. If at the date of registration of the lease any caution or notice of deposit was entered on the reversionary title, a warning-off notice will be served by the Registry (*i*), and any consequent objection must be considered (*k*).

(2) If the lessor is registered with a good leasehold title, an

(*g*) Land Registration Act, 1925, s. 112; Land Registration Rules, 1925, r. 289 (1); Land Registration Rules, 1930 and 1936.

(*h*) See *Paddington Borough Council* v. *Finucane* [1928] 1 Ch. 567; *Bristol Corporation* v. *Virgin* [1928] 2 K.B. 622.

(*i*) Land Registration Rules, 1925, rr. 218, 239 (4) and 242 (1).

(*k*) *Ibid.*, rr. 219, 220.

application for registration of a sub-lease with absolute leasehold title must be accompanied by an application to convert the lessor's good leasehold title to an absolute leasehold title and an *ad valorem* fee based on the value of the lessor's title must be paid (*l*).

(3) If the title to the freehold or to any superior leasehold interest is not registered, an examined abstract of the title to the unregistered reversionary interests must be supplied to the Registry, proving the title of the lessor to grant the lease or sub-lease. Questions as to consents by chargees or mortgagees or arising under a prohibition against alienation must (as mentioned above) be proved satisfactorily.

(4) If a superior leasehold title has been registered as good leasehold for more than ten years, an application for its conversion to absolute must be made in Land Registry form 7 (*m*). The questions of a prohibition against alienation and the curtailment of a mortgagor's power of leasing must be considered, as mentioned above.

Registration of Dispositionary Rentcharges

Although the title to a rentcharge is never compulsorily registrable by reason of the land out of which it issues lying within an area of compulsory registration (*n*), the principle enunciated above in regard to the completion by registration of leases that are dispositions of registered land applies to it. Thus when, on the transfer of registered land, wherever situated, a perpetual or terminable legal rentcharge is reserved to the vendor (*o*), the title to it must be completed by registration (*p*). For this purpose the rentowner is *not* required to complete and lodge at the Registry one of the usual forms of application for first registration (*q*), but the fee payable (*r*) covers its registration, which is automatically carried out by the Registry (*s*). On the other hand, when a rentcharge is created independently of any sale of the land out of which it issues (*t*), the onus rests upon the rentowner to apply for first registration of his title, using one of

(*l*) Under the Land Registration Fee Order, 1930, para. VII.

(*m*) Land Registration Rules, 1925, r. 48; Sched., form 7: see the Land Registration Act, 1925, s. 77 (4).

(*n*) Land Registration Act, 1925, s. 120 (1), proviso.

(*o*) *Ibid.*, ss. 18 (1) (d), 21 (1) (b).

(*p*) *Ibid.*, ss. 19 (2), 22 (2).

(*q*) *i.e.*, the appropriate one of forms 1F, 1H, 1G, or 1G(Co).

(*r*) See the Land Registration Fee Order, 1930, abatement 7, and Fee Order Rule 11.

(*s*) Land Registration Rules, 1925, rr. 107, 108.

(*t*) Under the Land Registration Act, 1925, ss. 18 (2), 22 (2).

the normal application forms relating to rentcharges (*u*). Until he does so he does not secure the legal estate in the rentcharge (*a*).

Forms of Leases and Other Deeds

This article is something of a hotchpot, so that the addition of one more odd ingredient may do it no harm. One of the prime objects of any system of registration of title is to achieve simplicity, not merely because that, in itself, is an intrinsically good thing, but also because the task of the lawyer is lightened in direct ratio with the degree of simplicity that is attained, so that he not only becomes better rewarded for the work he does, but has more time to devote to other tasks.

Some lawyers in this country still regard land registration as something novel and in the nature of a limited experiment, overlooking the fact that in many of the great dominions, states, provinces and territories of the British Commonwealth it is the *only* accepted—and, indeed, acceptable—system of conveyancing. We can learn many lessons from our brethren abroad in this matter of simplicity. For example, in several of the Australian states, where land is being developed as a building estate, the legislature has made full and careful arrangements for the automatic grant and reservation of all easements of way, water, drainage, gas, electricity and in connection with telephones, so that each individual purchaser will both enjoy and hold subject to all necessary rights in connection with the usual services without a single syllable about them being put into his transfer of part (*b*). There is little doubt that when our antipodean friends become inured to the notion of freehold flats their legislatures, which are far more responsive than ours, will speedily make similar ample arrangements in regard to the dominant and servient tenements in them, and also in regard to the parts of the building held in the common interest. Similarly, in Australia, town-planning control is so closely inter-related with the transfer of land (*c*) that it is seldom found necessary to impose restrictive covenants. Those who, in England, constantly bear the burden imposed by Mr. Tulk's rather ridiculous legacy (*d*), would welcome its alleviation by any means. All such improvements, however, depend upon the possession of that precious and almost unobtainable panacea called parliamentary time.

(*u*) See note (*q*) above.
(*a*) Land Registration Act, 1925, ss. 20 (1), 23 (1).
(*b*) See, *e.g.*, the Transfer of Land Act, 1954 (Victoria, Australia), ss. 97 and 98.
(*c*) See, *e.g.*, *ibid.*, s. 97; also the Local Government Act, 1946, s. 59 and the Water Act, 1928, s. 59 (both of Victoria).
(*d*) On the assumption that *Tulk* v. *Moxhay* (1842) 2 Ph. 744 started the rot.

In regard to the form of leases, the writer has, on a number of occasions (*e*), called attention to an available remedy for verbosity which is over a century old. The Leases Act, 1845 (*f*), is still unspent and unrepealed and is still—as it probably has been from the start—neglected (*g*). The aim of the Act was to cut out the excessive wordiness commonly used in leases. It provided that the simple phrase, "That the said lessee covenants with the said lessor to pay rent" should have the same effect as an extensive similar covenant in fifty-one words. "And pay taxes" is made to do duty for another eighty-seven words, whilst "and to repair" covers eighty more words. All the usual covenants are similarly abbreviated. It is true that the form of some of these clauses might now be considered a little out of date. It is also true that alternative and sometimes *ad hoc* clauses may, in any event, be required to meet particular circumstances. But the Act still remains on the statute book, and it allows for variations, and all those practitioners who are economically minded and bold enough to use it in whole or in part are at liberty to do so.

It is remarkable that our cautious and conservative forefathers of nearly eighty years ago were willing to compress the 553 words of the common covenants for title into the three words "as beneficial owner" (*h*). It is even more remarkable that the architects of the 1925 property statutes did not re-enact in the Land Registration Act of that year, in the modern idiom, the gist of the Leases Act, 1845, particularly as such economies have for long been in daily use in many parts of the Commonwealth (*i*). Again, parliamentary time and an energetic demand by lawyers for it to be provided are needed. Meanwhile, the writer believes that if only a formula were to be promulgated from an authoritative source, such as the Law Society, a *de facto* solution might possibly be accomplished. Meanwhile, is it too much to hope that some enterprising draftsman will break the ice by importing (as he may surely safely do) the covenants for payment of rent and of taxes, the proviso for re-entry, and the covenant for quiet enjoyment by reference to the Act? Others, afterwards, might be tempted to better his efforts. All that is needed is that he should state that

(*e*) See, *e.g.*, *The Law Society's Gazette*, June, 1958, p. 343.

(*f*) 8 & 9 Vict. c. 124.

(*g*) Although a section of it was as recently as 1932 saved by the Solicitor's Act of that year, s. 70 (i).

(*h*) Conveyancing Act, 1881, s. 7.

(*i*) See, *e.g.*, the Transfer of Land Act, 1954 (Victoria), s. 66; the Real Property Act, 1862 (Tasmania), s. 65; the Short Form of Leases Act, 1948 (Br.Columbia, rev.st.ch. 307). Many other examples could be cited.

the lease is made in pursuance of the Leases Act, 1845 (*k*), and then use such of the short forms of words set out in column I of the Second Schedule as he wishes to incorporate in the deed. The resultant saving would, without doubt, reward members of a profession who find it increasingly difficult to recruit shorthand typists as well as highly qualified staff.

(*k*) Leases Act, 1845, s. 1 and 2nd Schedule.

NOTICE, REGISTRATION AND KNOWLEDGE

By J. F. Garner, ll.m., Solicitor

Since the passing of the Law of Property Act, 1925, it has been possible to state that "registration is notice," so far as concerns matters that are registrable in the land charges register (or in the charges register in the case of registered land) or in the appropriate local land charges register. Section 198 of the 1925 Act provides that registration "shall be deemed to constitute actual notice of [such] instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected." Section 199 goes on to deal with the position where a registrable matter is not in fact registered and the doctrine of constructive notice generally, but that section is specifically confined to purchasers in good faith for valuable consideration (see the definition of "purchaser" in section 205 (1) of the Act).

How far does the imputation of notice by virtue of the fact of registration extend? Obviously it applies whether or not the person affected has made a search of the appropriate register; that is the main object of the statute. It is probably also wide enough to "fix" a purchaser with an obligation to accept the title, where the vendor has contracted to sell free from incumbrances but has not disclosed the existence of the registered charge (assuming also that there is no saving clause in the contract (*a*)). This is the result of the famous—or notorious—decision in *Re Forsey and Hollebone's Contract* (*b*), which principle was recommended for abolition in the Report of the Committee on Land Charges in 1956 (*c*). Messrs. Megarry and Wade (*d*) argue that the general principle that registration is notice cannot have so wide an effect, because "notice" is not necessarily the same thing as "knowledge," and a purchaser can object to an incumbrance except where he has waived his right to do so; in order that he may be said to have waived a right, he must surely have had actual knowledge of the facts. Strictly speaking, *Re Forsey and Hollebone's Contract* is not a binding authority on the point as Eve J. had found that

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(*a*) As in the current edition of the Law Society's *Conditions of Sale*.
(*b*) [1927] 2 Ch. 379.
(*c*) Cmd. 9825. It seems that this report is to join the Report on Local Land Charges (Cmd. 8440, 1952) in some musty pigeon hole.
(*d*) *The Law of Property*, p. 541.

the "incumbrance" registered in that case was not in law an incumbrance at all, and therefore the learned judge's remarks on the effect of a registered but otherwise undisclosed incumbrance were *obiter*. Nevertheless, these remarks, to the effect that a purchaser will be bound by a registered charge for all purposes and as against his vendor, have been acted upon by the profession for the last twenty-five years. If searches are not made before contract, the purchaser has himself to blame for any unpleasant consequences where (as in a case of a purchase by auction) he has acted without professional advice; on the other hand where a solicitor acts for the purchaser, the failure to make the usual searches prior to contract will almost certainly amount to professional negligence for which the solicitor would be liable (*e*). It is perhaps strange that there has been no further litigation to clear up the doubts left by *Re Forsey and Hollebone's Contract*; as it is, each year that Eve J.'s dicta go unchallenged, the illogical principle seems to become more firmly entrenched as the result of the practice of conveyancers.

Does this constructive notice also amount to knowledge for the purposes of criminal responsibility? Section 16 of the Housing Act, 1957, requires a local authority to serve a notice, leading eventually to the demolition of the house, where a house in their area is unfit for human habitation and is incapable of being rendered so fit at reasonable expense. The owner, if he so elects, may then come forward with an undertaking (in the terms of the section) to the effect that the house will not be used for human habitation (*f*), and if that undertaking is accepted by the local authority, the house will be saved from demolition. Alternatively, if no such undertaking is given, a demolition order, or possibly a closing order (*g*), will be made in respect of the house. Any person who, *knowing* that such an undertaking has been given, or that a demolition order or closing order has become operative, uses the premises in contravention of the undertaking or order (as the case may be) may be guilty of an offence (*h*). Such undertakings, at least those which refer to the use of the premises as distinct from the execution of works (*i*), and such orders, are registrable as local land charges in Part IV of the appropriate local register. The question then arises whether registration of an undertaking or order,

(*e*) See, *e.g.*, *Goody* v. *Baring* [1956] 2 All E.R. 11, *per* Danckwerts J., at p. 16.
(*f*) Housing Act, 1957, s. 16 (4).
(*g*) *Ibid.*, s. 17.
(*h*) *Ibid.*, ss. 16 (6), 22 (4) and 27 (1).
(*i*) See Report of Committee on Local Land Charges (*supra*), Appendix D, para. 26.

which constitutes "actual notice . . . to all persons and for all purposes" (s. 198, *supra*), imputes knowledge of the existence of the undertaking or order to any defendant using the premises in contravention thereof, for the purposes of the appropriate section of the Housing Act, 1957.

In criminal proceedings, the words of a penal section are strictly construed, and *mens rea* is an ingredient of any offence unless the statute has clearly indicated otherwise; in any case where "knowledge" is an essential ingredient in a statutory offence (indicated normally, as here, by use of the adverb "knowingly"), it seems clear that "guilty knowledge" is required not only of the doing of the primary act, but also of the various elements which together constitute the statutory offence (*j*). The squatter or weekly tenant who takes up occupation in a house the subject of an undertaking, demolition order or closing order in contravention thereof cannot therefore, it is submitted, be said to do so *knowingly*, simply because the undertaking or order is registered in the local land charges register; in any case, it is not customary for such a person to carry out a search in those circumstances. The owner who lets such a property may also be liable under the appropriate section, if he *permits* the premises to be used contrary to the terms of the undertaking or order; here, of course, something more than mere "squatting" would have to be established to secure a conviction, for the owner must not only "know" the existence of the undertaking or order, but he must also in some measure be shown to have acquiesced in the occupation of the premises. However, assuming the latter can be established against the owner, or if he occupies the premises himself, and if he did not himself enter into the undertaking (or was not the owner when the order was made), in which event he could not very well be heard to say that he did not "know" of the existence of the undertaking or order, does registration then amount to guilty knowledge for the purpose of criminal proceedings? Two types of case must be considered: (i) where the owner-defendant acquired the property by purchase for valuable consideration; and (ii) where he acquired it as a beneficiary under a will or intestacy or as a gift *inter vivos*.

In the case of a purchase, it would, prima facie, seem reasonable that the constructive notice of registration should be held to amount also to knowledge for the purposes of the Housing Act sections referred to; section 198 of the 1925 Act clearly had

(*j*) *Mens Rea in Statutory Offences*, by J. L. J. Edwards, at p. 253, and see also Chap. III, *ibid.*

purchasers in mind. If it can be shown that the defendant, when he acquired the property, deliberately refrained from searching the register, this will clearly be sufficient to secure a conviction, but if the failure to search was a matter of carelessness or ignorance on his own part, or *a fortiori* if it was due to his solicitor's negligence (*k*), the position is by no means so clear. In the Road Traffic Act case of *Taylor's Central Garage* v. *Roper* (*l*), Devlin J. said, at p. 449, that "there is a vast difference between a state of mind which consists of deliberately refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make. . . . The case of shutting the eyes is actual knowledge in the eyes of the law; the case of merely neglecting to make inquiries is not actual knowledge at all, but comes within the legal conception of constructive knowledge which is not a conception which, generally speaking, has any place in the criminal law." His lordship was not, of course, here adverting to cases of registration, but it is submitted that sufficient indication here appears of the probable attitude that would be adopted by the courts, and it is very doubtful whether they would impute knowledge to a defendant simply from the fact of registration and an innocent or accidental failure to search. In the case of the beneficiary or donee under a gift, the argument for the defendant is even stronger, for here it cannot even be urged that it is common practice to search before deciding whether to accept or disclaim the bequest or gift.

Where the charge that is registered is protected by an absolute prohibition in the statute, different considerations may arise. For example, the consent of the local authority has to be obtained to the erection of a building to be constructed of "short-lived materials," under section 53 of the Public Health Act, 1936, and, in granting consent under that section, the local authority may, if they think fit, impose certain conditions, which are registrable in Part IV of the local land charges register. If these conditions are not complied with, the person responsible will be guilty of an offence (*m*), and the section says nothing about the defendant having to be aware of the existence of the conditions in the particular

(*k*) The principle of vicarious responsibility for a statutory offence, recognised in a few cases (such as, *e.g.*, *Bond* v. *Evans* (1888) 21 Q.B.D. 249, and others referred to by Edwards, *op. cit.*, at p. 228) cannot be applied here. The relationship of master and servant does not exist between client and solicitor, and also the act (or omission) of failing to search is not itself the criminal act complained of.

(*l*) (1951) 115 J.P. 445.

(*m*) Public Health Act, 1936, s. 53 (6).

case. Here, therefore, the question of " knowledge " does not arise, and the fact of registration of the conditions will only be relevant to rebut any mitigating circumstances that may be put forward by the defendant after conviction. If the conditions are not in fact registered, the local authority would have difficulty in enforcing them against a subsequent purchaser for value of a legal estate in the land.

To sum up, notice " to all persons and for all purposes " does not seem to mean quite what it says, and it is certainly doubtful whether it can be extended outside a conveyancing context into the criminal law.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Abdulla v. *Shah* [1959] 2 W.L.R. 12

Sale of land—vendor's duty to purchaser—reletting.—This case concerned land in Kenya, but was decided on the basis that English law applied. After contract, but before conveyance, a tenant of part of the land surrendered his tenancy and the vendors relet on a rent-restricted tenancy without consulting the prospective purchaser. The value of the property partly vacant would have been greater than it actually was at completion. The Judicial Committee of the Privy Council (Lord Reid, Lord Cohen and Lord Somervell of Harrow) held that the vendor was in breach of his duty to the purchaser and must pay compensation. Reliance was placed on *Egmont* v. *Smith* (1877) 6 Ch.D. 469, where Jessel M.R. had said that a vendor should give notice of an impending vacancy by determination of a tenancy to a purchaser, ask him what he wished done and act upon it, provided there were arrangements for indemnity if loss was caused and the sale went off. This decision is therefore a useful reminder and clarification of a vendor's duty, as trustee or quasi-trustee, to a purchaser. (See Emmet on *Title*, 14th ed., Vol. 2, at p. 213.)

Re Eichholz (*deceased*) [1959] 2 W.L.R. 200; [1959] 1 All E.R. 166 (Ch.D.)

Conveyance with intent to defraud creditors—when voidable—administration in bankruptcy—Law of Property Act, 1925; *Bankruptcy Act*, 1914, *ss.* 42, 130.—The Law of Property Act, 1925, s. 172, enacts that " every conveyance of property . . . with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced," but the section does not extend to " any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors." These provisions replace, in a shortened and modernised form, the Statute 13 Eliz. c. 5 (1571). In redrafting, two possibly significant changes in wording were made. First, conveyances for good consideration (*i.e.*, natural love and affection) were included, as well as conveyances for valuable consideration; the Statute of Elizabeth I referred to good consideration only, but in those days that was equivalent to valuable consideration. Secondly, the Law of Property Act speaks of a " conveyance " (later defined in section 205

(1) (ii)), whereas the earlier statute mentioned a whole list of transactions, including "alienation." Though there have been plenty of cases under the earlier Act, this would appear to be the first direct decision on section 172 of the Law of Property Act, 1925.

E., a solicitor, died in November, 1957, an apparently wealthy man, but was found in fact to be hopelessly insolvent and to have misappropriated very large sums of clients' moneys. An order was therefore made for the administration of the estate in bankruptcy. In 1954 E. had married the defendant, who was formerly employed in his household and without means of her own. In February, 1955, E. had contracted to buy Lamberhurst Manor for £15,500, and in March, 1955, the purchase was completed by a conveyance to the defendant in fee simple, on—as it was held—oral instructions given by the deceased, who was not a party to the conveyance, but in fact provided the purchase money.

On the facts (which have been condensed above), Harman J. found that there was a gift to the wife, there being no evidence to rebut the presumption of advancement (referring to *Silver* v. *Silver* [1958] 1 W.L.R. 259; [1958] 1 All E.R. 523, noted *ante*, Vol. 22, p. 225). The learned judge then considered "whether the gift was voluntary or made for good consideration" (a point raised only at the hearing by an amendment of the defence then) and, finding it was not made in consideration of marriage, rejected "the argument that there was any consideration for the gift" ([1959] 2 W.L.R., at pp. 206–207; [1959] 1 All E.R. at pp. 172–173). It will be observed that here "good consideration" was equated with "valuable consideration," as under the Statute 13 Eliz. c. 5. So far as the above cited reports show, the question of whether "natural love and affection" ousts the Law of Property Act, s. 172 was not specifically considered. This is, with respect, rather a pity, for most of the books suggest that the law was probably changed in 1925 (*e.g.*, Halsbury, *Laws of England*, 3rd ed., Vol. 17, p. 654). Of course, if "natural love and affection" does oust jurisdiction, then the exception in section 172 will be a dead letter, for few voluntary conveyances in fraud of creditors are made to strangers in blood.

It was, however, argued that there was here no "conveyance" within section 172. On this point, Harman J. stressed that the Law of Property Act was primarily a consolidating rather than an amending Act, and therefore should not be taken as amending the law *sub silentio* (citing *Gilbert* v. *Gilbert and Brucher* [1928] P. 1 and *Re Turner's Will Trusts* [1937] Ch. 15), and went on to hold that the definition of conveyance (Law of Property Act, s. 205 (1) (ii)) was not exhaustive but merely a list of examples. He therefore concluded that writing was not a *sine qua non* for a conveyance under section 172, but in any event there was writing, for "the assurance passed to the widow not only the vendor's legal estate but the deceased's equitable interest, and it is this which can be recovered by the creditors" ([1959] 2 W.L.R., at p. 213; [1959] 1 All E.R., at p. 178). This part of the decision may be compared with *Wright* v. *Macadam* [1949] 2 K.B. 744, where "conveyance" in section 62 of the Law of Property Act, 1925, was held to include an agreement under hand only, conferring a legal estate, and with *Grey* v. *I. R. C.* [1958] 3

W.L.R. 45, noted *ante*, Vol. 22, pp. 141, 301, as regards oral dispositions of equitable interests. It will also be seen that Harman J.'s approach to the construction of the Law of Property Act would also have led him to the conclusion, mentioned above, that the Act had not altered the law concerning consideration and conveyances in fraud of creditors.

In this case it was conceded that a trustee administering an insolvent estate cannot rely on the Bankruptcy Act, 1914, s. 42 (following *Re Gould, ex p. Official Receiver* (1887) 19 Q.B.D. 92), but Harman J. held that an order for administration under the Bankruptcy Act, 1914, s. 130, did not oust the Law of Property Act, 1925, s. 172, and that if there was any difficulty about the trustee maintaining the action a representative creditor could be added as plaintiff. It has also been held that property actually appointed under a general power is caught by the Law of Property Act, s. 172, but not by the Bankruptcy Act, 1914, s. 42 (see *Re Mathieson* [1927] 1 Ch. 283—where section 172 was not discussed), though a trustee in bankruptcy can exercise a general power under the Bankruptcy Act, 1914, s. 38.

Churcher and another v. *Street and another* [1959] 2 W.L.R. 66; [1959] 1 All E.R. 23 (Ch.D)

Deserted wife's licence in matrimonial home—mortgagees with knowledge—concurrence in transaction intended to terminate wife's possession—nature and exercise of court's discretion.—After *Thompson* v. *Earthy* [1951] 2 K.B. 596, it seemed that the deserted wife's licence to remain in the matrimonial home was good against only her husband (and in some cases the husband's landlord: *Middleton* v. *Baldock* [1950] 1 K.B. 657). After *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, it appeared that her licence might well be a full and new equitable interest in land. But in *Jess B. Woodcock & Son, Ltd.* v. *Hobbs* [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445 and *Westminster Bank, Ltd.* v. *Lee* [1956] Ch. 7, the courts took a middle course, establishing the deserted wife's licence as at the most only a right to remain subject to the discretion of the court, with the status of a mere equity, and therefore not binding at all on a bona fide purchaser without notice of a legal or equitable interest in the land; moreover, in *Westminster Bank, Ltd.* v. *Lee*, it was held that the wife's possession was not *per se* notice. As will be seen, the present case emphasises the very rapid development of the law in this sphere.

In an article ("The Deserted Wife's Licence" (1955) 19 Conveyancer (N.S.) 343) published after the last-mentioned decision, the present writer remarked (p. 345) that interest would be likely to shift to the practice of the court in the exercise of its discretion. The present case bears out that suggestion, for the existence of the wife's equity was not challenged and Roxburgh J.'s judgment, occupying some twelve pages in the reports, is almost wholly concerned with the exercise of the court's discretion. Before setting out the facts it

is convenient to mention, first, that the learned judge defined the discretion as being judge-made and arising *ex necessitate rei* rather than from any extension of the Married Women's Property Act, 1882, s. 17, and second, that he found no limitations therein except that, like all discretions, it had to be exercised judicially ([1959] 2 W.L.R., at pp. 72, 75; [1959] 1 All E.R., at pp. 32–33 and pp. 33–34).

The facts were complicated. Mr. Denham deserted his wife in 1942, leaving her in the matrimonial home, and went to live with Mrs. Street. In 1949 he bought a second house, his wife having agreed to move there, but on the day before the proposed move, she consulted her solicitors and on their advice refused to go. Mr. Denham was therefore left with two houses, both of which he mortgaged to the then Churcher trustees, whose successors in title were the present plaintiffs. It was conceded that the trustees took the mortgage with knowledge of Mrs. Denham's occupation as a deserted wife. In 1951, the present plaintiff Churcher (not then a trustee but a solicitor in partnership with one of the trustees) devised a scheme whereby the matrimonial home should be sold to Mrs. Street, who should seek possession from Mrs. Denham. At this time, so Roxburgh J. now held, the plaintiff was acting solely as solicitor to Mr. Denham. The proposal was submitted to counsel, who advised that it was sound in law and not an abuse of process, though possibly productive of "unpleasantness." The sale of the matrimonial home to Mrs. Street therefore took place, the Churcher trustees taking repayment of the existing mortgage and taking a fresh one for £950 (Mr. Denham joining as surety and charging his second house as collateral), and proceedings for possession were begun. But in *Bendall* v. *McWhirter, supra*, Denning L.J. (as he then was) instanced such a claim and said: "No civilised community could tolerate such a cynical disregard of the married state" ([1952] 2 Q.B., at p. 484). Consequently, Mrs. Street's action was dismissed when it came on as *Street* v. *Denham* [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532. Mrs. Denham continued to remain in the matrimonial home, a three-bedroomed house in which she had been alone since 1950, having a maintenance payment of £2 per week as almost her sole income. In 1954, Mr. Denham sold his second house and it was released from the mortgage on payment of £200, reducing the debt to £750. Thereafter Mrs. Street and Mr. Denham, in Roxburgh J.'s words, became industrious to forget their payments of interest on the mortgage of the matrimonial home, and demands produced no result: nearly £50 arrears of interest were now due. Consequently the Churcher trustees now sought possession of the mortgaged property.

Roxburgh J. reviewed the above history in detail, and also examined carefully the statements as to the exercise of the wife's discretion made in *Jess B. Woodcock, Ltd.* v. *Hobbs, supra*. He concluded (1) that the conduct of the Churcher trustees, in concurring in a transaction (the sale to Mrs. Street) designed to take advantage of strict legal rights, should not disentitle their beneficiaries—the real sufferers—to relief; (2) no breach of trust had been committed; (3) a deserted wife, not in any way incapacitated, cannot expect to live rent free indefinitely in the matrimonial home—"in this sort of

matter it does, after a lapse of years, I think, become incumbent on injured wives to try to mitigate the practical damage even if they cannot solace emotional distress" ([1959] 1 All E.R., at p. 30; compare [1959] 2 W.L.R., at p. 76); (4) an order for possession would be made, suspended for six months, during which Mrs. Denham could make proposals; if she would agree by deed to discharge the mortgage liabilities, including arrears of interest other than repayment of capital, she would be allowed to stay longer. The inability to call in capital and restriction to the interest rate of 4 per cent., were "on the whole the price that they [the plaintiffs] ought to pay, for having burned their fingers in this transaction" ([1959] 1 All E.R., at p. 36).

In the article above referred to, after considering *Jess B. Woodcock, Ltd.* v. *Hobbs, supra,* and *Westminster Bank, Ltd.* v. *Lee, supra,* the present writer said (19 Conveyancer (N.S.) at p. 346): "It looks therefore, as if a purchaser [mortgagee] with only constructive notice of the deserted wife's occupation, may expect to get possession in a few months; as to others, *quaere.*" This, it is submitted, is still correct. Though the facts in the instant case are probably unique, the decision indicates that a deserted wife, not incapable of earning, must at least genuinely try to get a job and make some contribution to her husband's debts if his creditors seek possession. This view is also supported by dicta in *Bendall* v. *McWhirter* [1952] 2 Q.B., at pp. 484–485 *per* Denning L.J. and at pp. 488–489 *per* Romer L.J. As to others, such as donees—still *quaere*!

Mohamedali Jaffer Karachiwalla v. *Noorally Rattanshi Rajan Nanji and others* [1958] 3 W.L.R. 572; [1959] 1 All E.R. 137 (P.C.)

Mortgage—construction—power of sale—Indian Transfer of Property Act, 1882, *s.* 67.—By the Indian Transfer of Property Act, 1882, s. 67 (as applied to Kenya), a mortgagee may, "in the absence of a contract to the contrary," ask the court for a decree of foreclosure or sale "at any time after the mortgage money has become payable to him." A third mortgage of leasehold land, made in 1951 and drafted without any great nicety, contained (1) a covenant by the mortgagor to pay the principal sum of 150,000 shillings to the mortgagee on June 30, 1968, and interest in the meantime; (2) a further covenant by the mortgagor to repay the principal by twenty-five instalments, expiring on June 30, 1968; (3) a clause stating that the mortgagee could demand and recover the principal sum if at any time the mortgagor defaulted on any of his obligations; and (4) a proviso for redemption in the form of a covenant by the mortgagee to reassign the land if the principal was repaid by June 30, 1968. Default occurred and the principal sum became due, but the mortgagor argued that the above provisions amounted to a "contract to the contrary" within section 67 of the Indian Transfer of Property Act, 1882. The Judicial Committee of the Privy Council (Lord Radcliffe, Lord Tucker and Mr. L. M. de Silva) had little difficulty in rejecting

this argument and holding that the mortgagee had power to enforce his security once the principal sum became due.

This case is, therefore, one of construction on the facts, but is also a reminder that instalment mortgages may give rise to similar problems under the Law of Property Act, 1925, s. 101, which requires the mortgage money to be due before the mortgagee's statutory powers under that section arise. Thus in *Payne* v. *Cardiff U. D. C.* [1932] 1 K.B. 241, it was decided the powers arose if only one instalment of principal was due. In this connection it may be noted that the editors of Key and Elphinstone's *Precedents in Conveyancing* are content to assume that under a charge by way of legal mortgage the money becomes due at law on the date mentioned in the covenant to repayment (15th ed., Vol. 2, at p. 100, footnote (*r*)). It is submitted, with respect, that the matter is so important that a specific clause is desirable—even if it be *ex abundante cautela*.

In the instant case the Judicial Committee also declined to investigate the procedure of the Kenya courts or to interfere with the order of the Supreme Court of Kenya, whereby the mortgagor was required also to make provision for repayment of the two prior mortgages. Lord Radcliffe, delivering the advice of the Judicial Committee, remarked that in England the problem would not have arisen, because a later mortgagee cannot, by enforcing his security, affect the rights of a prior mortgagee. But, of course, if he wishes to redeem a prior mortgage then the maxim "redeem up, foreclose down" may make it necessary to join others (see Megarry & Wade, *Law of Real Property*, at p. 835).

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2. *WILLS*

By A. Kiralfy, Barrister-at-law

Re Berrey's Will Trusts [1959] 1 W.L.R. 30; [1959] 1 All E.R. 15

Legacies primarily charged on lapsed share of residue —statutory order—Administration of Estates Act, 1925, *s.* 34.— Danckwerts J. has here stated the law in a clear form for the future. He has followed his own decision in *Re Martin* [1955] Ch. 698 and that of Harman J. in *Re Midgley* [1955] Ch. 576. He has distinguished his former decision in *Re Beaumont* [1950] Ch. 462 without much conviction and in effect disapproved it. That *Martin* and *Beaumont* were in conflict was suggested by me in 19 Conveyancer, at p. 229. It is now clearly laid down, with reasons, why the Court of Appeal came to their decision in *Re Worthington* [1933] Ch. 721, a decision binding on the judges of first instance and the Court of Appeal itself. Danckwerts J. has pointed out in several cases how, in dealing with the order of application of assets to pay debts, the legislature referred to a fund being set aside out of property undisposed of by the will, if any, or thereafter out of residue, to meet pecuniary legacies, but that the legislature never distinctly said that legacies were to be paid in this way. The implication is, however, clear, and the Schedule to the Administration of Estates Act thus gives us an order of use of assets to meet pecuniary

legacies. In the instant case the testatrix directed that debts and funeral expenses be paid, proceeded to give pecuniary legacies, and bequeathed the residue, *after* debts and expenses had been paid, to four persons. One of these four did not survive the testatrix and this share lapsed and the money attributable to it passed as on intestacy. Danckwerts J. held that administrative expenses must be charged on all four shares *pari passu*, as the testatrix contemplated the payment of expenses before residue was ascertained (and thus altered the statutory order), but that the legacies were primarily payable out of the lapsed fourth share, in exoneration of the other three shares. No question of whether to pay legacies out of real or personal property arose in this case, so that the law on that topic remains rather unsatisfactory.

(Theobald 695)

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3. *LANDLORD AND TENANT*

By D. Macintyre, m.a., Barrister-at-Law

Frankland and another v. *Capstick* [1959] 1 W.L.R. 204; [1959] 1 All E.R. 209 (C.A.)

Agricultural Holdings Act, 1948—claim for dilapidations—landlord's name incorrectly stated—whether notice of claim valid.—After the surrender by agreement of an agricultural tenancy the solicitors for the landlord served a notice of claim for dilapidations under the Agricultural Holdings Act, 1948, which began with the words "As solicitors for your landlord Raven Frankland. . . ." In fact Raven Frankland was the son of the landlord, Edward Percy Frankland, who managed the property on behalf of his father. The Court of Appeal held that even so, the notice was not invalid. It was an ambiguous notice: but it had clearly been given on behalf of the landlord, and there was no evidence that the tenant was in any way deceived by the misnomer. Indeed, she had herself negotiated the surrender of the tenancy with the true landlord, who had personally signed the agreement to surrender.

Warner v. *Sampson and another* [1959] 2 W.L.R. 109; [1959] 1 All E.R. 120 (C.A.)

Forfeiture—repudiation of landlord's title—action by landlord for possession—statement of claim setting out landlord's title—general denial of statement of claim in defence—reply by landlord forfeiting lease—whether forfeiture effective.—The decision of Ashworth J. in this case (noted at Vol. 22, p. 150) has been reversed on appeal. A general traverse of the allegations contained in a statement of claim does not amount to a denial of a landlord's title, which will give the landlord a right to forfeiture of the lease, since it does no more than put the landlord to formal proof of those allegations. *Kisch* v. *Hawes*

Brothers, Ltd. [1935] Ch. 102, upon which Ashworth J. relied on this point, has been overruled. Further, even if the denial in the original defence had given the landlord a right to claim a forfeiture, that right, in the view of both Hodson and Ormerod L.JJ., had never been validly exercised, since (1) the landlord's original reply amounted to nothing more than a notice of his intention to re-enter, and (2) at the time when the landlord made an actual claim to possession (*i.e.*, at the time of her reply to the amended defence) the defence had already been amended and the landlord's title admitted. Thus, before the landlord had either re-entered or started proceedings for re-entry, the alleged denial of title had been removed.

Brown v. *Jamieson and another* [1959] 2 W.L.R. 156; [1959] 1 All E.R. 144 (C.A.)

Landlord and Tenant Act, 1954—*business premises—recovery of possession—shop and living accommodation—notice to quit under contract of tenancy—premises within Rent Acts at time of notice—decontrolled by Rent Act,* 1957, *before expiration of notice period—whether tenancy determined—Act of* 1954, *s.* 24 (3) (b).—Section 24 (3) (b) of the Landlord and Tenant Act, 1954, provides that where, at a time when a tenancy is not one to which Part II of the Act applies, the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes one to which Part II applies after the giving of the notice. The landlord in this case gave twelve months' notice to quit the premises, in accordance with the contract of tenancy; and at the time when he did so the tenancy was not one to which Part II of the Landlord and Tenant Act applied, because the premises, a shop with living accommodation, were at that time within the protection of the Rent Acts (see Act of 1954, s. 43 (1) (c)). Before the notice to quit expired, however, the premises were released from control under the Rent Acts by the Rent Act, 1957, since the rateable value of the premises (which were in London) was £40 per annum: and the tenancy, being of premises which were in fact used for business purposes, immediately became a tenancy to which Part II of the Act of 1954 applies (see s. 23 (1)). The question was whether, by virtue of section 24 (3) (b) of the Act of 1954, the tenancy had been validly determined by the notice to quit: or whether it was necessary to serve a new statutory notice under section 25 (1).

Applying section 24 (3) (b) literally to this situation, it would appear that the tenancy had been validly determined: and this was the view adopted by the majority of the Court of Appeal. Lord Cohen, however, dissented. In his view the scope of section 24 (3) (b) has been limited (at least so far as the Court of Appeal is concerned) by the decisions of Devlin J. and of the Court of Appeal in *Orman Brothers* v. *Greenbaum* ([1954] 1 W.L.R. 1520: [1955] 1 W.L.R. 248), so that the section only applies where there has been a change of user. Lord Evershed M.R. and Sellers L.J., on the other hand, whilst conceding that section 24 (3) can only apply when the Act is

already in force at the date of the notice to quit (*cf. Orman Brothers* v. *Greenbaum*), considered that cases where there has been a change of user provide but one illustration of the circumstances in which section 24 (3) (b) can apply. Further, Lord Evershed M.R. felt that it would not be right to treat *Orman Brothers* v. *Greenbaum* as laying down a far-reaching interpretation of the subsection upon a point not necessary to the decision in that case.

That this literal construction of section 24 (3) (b) leads to an anomalous, and probably unintended, result was clearly recognised. Why should a contractual tenant who happened to be under notice to quit at the time when the Rent Act, 1957, came into force be in a worse position than other contractual tenants or even statutory tenants at that date? But the majority of the court felt unable to avoid the anomaly.

Leave to appeal to the House of Lords has been granted.

Re No. 1 *Albemarle Street* [1959] 2 W.L.R. 171; [1959] 1 All E.R. 250 (Ch.D.)

Landlord and Tenant Act, 1954—*business premises—terms of new tenancy—licence to display advertising signs—whether to be included in new lease.*—An old lease of business premises contained a clause whereby the landlords authorised and permitted the tenants to maintain certain advertising signs outside the building. Upon an application for a new tenancy under the Landlord and Tenant Act, 1954, the landlords did not dispute the right of the tenants to a new lease: but they did dispute the right of the tenants to have the term relating to the advertising signs included in it, on the grounds that (1) the court had no jurisdiction to order the inclusion of such a clause, and (2) even if the court did have jurisdiction it ought not to be exercised in this case. The tenants relied, first, on section 32 (3) of the Act, which provides that where the current tenancy includes "rights enjoyed by the tenant" in connection with the holding, those rights "shall be included" in a tenancy ordered to be granted under section 29; and, secondly, on section 35, which provides that in determining the terms of a new tenancy, "the court shall have regard to the terms of the current tenancy and to all relevant circumstances." Upjohn J. decided in favour of the tenants. Section 32, in his view, is imperative and deals only with terms connected with the holding: and the right to exhibit advertising signs was a mere licence, which might not fall within the scope of that section. Section 35, however, confers a very wide discretion. The "terms of the current tenancy" for the purposes of section 35 are not confined to terms which touch or concern the land demised. Moreover, the court must also consider "all relevant circumstances." The court had jurisdiction, therefore, to order that the term relating to the advertising signs should be included in the new tenancy: and upon the facts of the case it was held that a term of that nature ought to be so included.

Cornish v. *Brook Green Laundry, Ltd. and others* [1959] 2 W.L.R. 215; [1959] 1 All E.R. 373 (C.A.)

Landlord and Tenant Act, 1954—business premises—recovery of possession—tenant and mesne landlord holding over under Act of 1954—agreement for new lease to mesne landlord subject to condition precedent—condition unfulfilled—whether equitable tenancy created—application for new tenancy by tenant—whether mesne landlord "competent landlord"—annual value over £500—jurisdiction of county court.—Before 1949 the applicant and the first respondents were tenants of adjoining business premises, Nos. 23 and 23A Lower Belgrave Street. Both were tenants of the trustees of the Westminster settled estates (the second respondents). In 1949 the trustees granted a seven-year lease of both sets of premises to the first respondents, who granted a sublease of No. 23 for seven years less three days to the applicant. At Michaelmas, 1956, both the applicant and the first respondents were holding over under the Landlord and Tenant Act, 1954. Early in 1957 the trustees offered the first respondents a new lease of No. 23, subject to their carrying out certain specified repairs, and the first respondents accepted this offer. In July, 1957, the first respondents offered the applicant a sublease of No. 23A, which was refused. In October, 1957, the applicant applied for a new tenancy of No. 23; and in December, 1957, the first respondents opposed the application on the grounds that (1) they intended to occupy No. 23 themselves (Act of 1954, s. 30 (1) (g)), and (2) they had offered suitable alternative accommodation (s. 30 (1) (d)). The county court judge found that the alternative accommodation was not suitable: but that the first respondents had established a genuine intention to occupy the premises themselves.

Upon these facts the applicant argued that (1) that at the date of the application the first respondents were holding over, not under the Act, but under a new equitable tenancy granted to them less than five years before the termination of the current tenancy, so that they were disqualified by section 30 (2) of the Act from relying on section 30 (1) (g), and (2) the first respondents were not "competent landlords" within the meaning of the Act.

Upon the first point the Court of Appeal held that the doctrine of *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9, did not apply to this case, since the offer of the trustees was conditional upon the specified works of repair being carried out, and at the time when the notice of opposition to the application was given this condition precedent had not been performed. Consequently, the first respondents were still holding over at that time under the lease of 1949, as extended by section 24 (1) of the Act of 1954, since they could not then have obtained specific performance of the new agreement.

Nor could it be said that the first respondents were not "competent landlords" at that time for the purposes of the Sixth Schedule. The definition of "tenancy" in section 69 (1) of the Act (upon which the applicant relied) was not, in the view of the court, "intended to exclude tenancies which, if not strictly 'created' by the Act, were given a statutory extension of life on the terms prescribed by the Act."

One further point arose. The county court judge doubted, the annual value of premises being over £500, whether he had jurisdiction to decide the question whether an equitable tenancy had been created or not. It was held, however, that although a county court judge is precluded by the County Courts Act from enforcing an agreement for a lease in a case of this nature, he is not precluded from deciding whether an equitable tenancy exists—provided, of course, that the rateable value of the premises does not exceed £500 (see Act of 1954, s. 63 (2)). *Foster* v. *Reeves* [1892] 2 Q.B. 255 (where the claim was for rent due under an agreement for a lease) was distinguished on this point.

Collins and another v. *Claughton* [1959] 1 W.L.R. 145; [1959] 1 All E.R. 95 (C.A.)

Rent Acts—statutory tenancy—surrender by operation of law—whether actual surrender of physical possession required.—By a letter signed by both husband and wife the husband, who was a statutory tenant of rent-controlled premises, asked his landlords to put the rent book in the name of his wife, who would thereafter be responsible for the rent, and the landlords agreed to and acted on this proposal. Later, as a result of matrimonial difficulties, the wife left the house and gave notice that she was terminating the tenancy. The husband continued to occupy the house. The question was whether the original tenancy of the husband had ever been validly surrendered. The Court of Appeal, applying *Foster* v. *Robinson* [1951] 1 K.B. 149, held that, apart from the Rent Acts, there had clearly been a surrender by operation of law. It was argued, however, on the authority of certain observations of Lord Greene M.R. in *Brown* v. *Draper* [1944] 1 K.B. 309, 313, that in Rent Act cases a tenant cannot deprive himself of the protection of the Acts without actually giving up physical possession of the premises. But the court held unanimously that even in Rent Act cases a notional surrender followed by the grant of a new interest is sufficient.

Holiday Fellowship, Ltd. v. *Hereford* [1959] 1 W.L.R. 211; [1959] 1 All E.R. 433 (C.A.)

Repairs—covenant to repair "main walls"—whether windows part of "main walls."—Is a window part of a main wall? That, in the view of the Court of Appeal, is a question of degree. In the present case, where the landlord was responsible for the repair of the main walls, the court held that the windows (*i.e.*, "the glass panels and the wooden framework and apparatus in which the glass is placed") did not form part of the main walls. Indeed, Lord Evershed M.R. would not have hesitated, had it not been for the existence of a certain amount of authority on the point. But there is nothing in either *Boswell* v. *Crucible Steel Co.* [1925] 1 K.B. 119 or *Taylor* v.

Webb [1937] 2 K.B. 283 (a case of skylights held to form parts of roof), which precludes a court from considering each case on its merits. And in the opinion of Lord Evershed M.R. and Romer L.J. the passage based on *Boswell's* case in Woodfall on *Landlord and Tenant* (25th ed., at p. 760) should be modified so as to read: "It would appear that windows in the outer walls of a building *may, in certain contexts and for certain purposes,* be regarded as part of the walls."

(Woodfall, p. 760.)

THE LIBRARY

The Law and Practice of Registered Conveyancing. By Sir George H. Curtis, c.b., Chief Land Registrar, of Gray's Inn, Barrister-at-Law, and Theodore B. F. Ruoff, Senior Assistant, H.M. Land Registry, Solicitor. Stevens & Sons, Ltd. lxiii, 1107 and (index) 79 pp. (£6 6s.)

Just over a year ago there was a complaint in this Journal that there was no really up-to-date, comprehensive book on the practice of land registration. Sir George Curtis and Mr. Theodore Ruoff—both of whom are well known to readers of *The Conveyancer*—have more than remedied this omission and have put all practitioners in their debt with this substantial tome, whose full title *The Law and Practice of Registered Conveyancing* accurately describes its scope. The authors, with their unrivalled experience and authority on the system of land registration, set out to instruct, counsel and guide the conveyancer in the courteous and helpful manner for which the staff of the Land Registry have long been noted. Not only have they given us a detailed elucidation of the Act and Rules—itself no mean feat—with a considered and critical analysis of the growing volume of case-law on the subject, but they have for the first time set out the procedure to be followed in registered land conveyancing in all its branches, and all aspects of land registry practice which concern the practitioner. For the student and specialist, this book will prove a worthy successor to *Brickdale and Stewart-Wallace*; for the practising solicitor it fills what has hitherto been an aching void on the bookshelves.

A typical example of the exhaustive treatment of both law and practice is to be found under the heading "Consolidation" (p. 570). The authors quote the relevant provisions of the Act and the Rules; consider the differing views as to their meaning and purpose expressed by Mr. Ambrose, *Brickdale and Stewart-Wallace,* and *Wolstenholme and Cherry*; set out their own views, and conclude by stating the registry practice. It is interesting to discover that no *ad hoc* trust for sale of registered land has ever been created, and a tribute to the thoroughness of the authors that this has not deterred them from outlining what might happen in practice should this phenomenon arise (p. 449).

The reviewer must confess that he deals primarily with unregistered land and recoils—as the sensitive conveyancer must recoil—from a system whose restrictions owe nothing to *Tulk* v. *Moxhay*, whose minor interests do not cease at twenty-one, and whose bankruptcy inhibitions are not the motivation for a deed of gift in favour of a wife. The unregistered conveyancer will find occasional polemic tendencies in this book. It presents a curious picture of unregistered conveyancing, where there are "frequent and grave possibilities of error" as to identity, where "an uncomfortably heterogeneous collection of interests" may be registered under "the clumsy machinery of the Land Charges Act"; where "litigation often ensures (*sic*) when the estate owner purports to sell to a purchaser free from the right of residence" under unwitting settlements; where title is "a matter of opinion," "a matter of conjecture" or "a matter of individual judgment" (pp. 385, 723, 396, 433, 129, 87, 89). It is a relief to find that "the Chief Land Registrar does not seek to discover whether the title is unimpeachable in every way" (p. 292), as "until the House of Lords has solemnly pronounced upon the question" (p. 89) this fine quality appears to be unattainable! It should not be thought

that the authors reserve their strictures for unregistered conveyancing, and are uncritical of the system they help to administer. They make it clear that they regard the minor interests index as an excrescence upon registered conveyancing, and the filing of settlements as an unnecessary lifting of the "legal estate curtain." The mortgage caution is condemned as "expensive, cumbersome, inconvenient and obsolescent" (p. 575) and the drafting of the Act does not escape censure on several points.

The authors faced a difficult problem of arrangement, and their solution is interesting. Part I outlines the system of land registration, with particular reference to the register and plans. Part II sets out the effect of registration and deals with overriding interests and minor interests. Part III is concerned with First Registration, and Part IV, which deals with Registered Dealings, contains excellent recommendations as to the methods of expediting registrations by avoiding unnecessary requisitions (p. 389) and very useful guidance as to the framing of declarations in support of claims for registration on the grounds of adverse possession (p. 678). Part V treats of Notices, Cautions, Inhibitions and Restrictions, and Part VI of Rectification of the Register and Indemnity. So comprehensive is this lay-out that only twenty-five pages are left for the "Miscellaneous" Part VII. The four Appendices contain the full text of the Land Registration Acts, the Land Registration Rules, the Land Registration Fee Order, 1930, and the Solicitors Remuneration (Registered Land) Orders. The authors have tried to make each chapter complete in itself, with a pleasing paucity of those cross-referential footnotes which make double-jointed fingers such an asset. The repetitions and inelegancies which inevitably result are therefore deliberate policy. The reviewer feels, for three reasons, that this policy is mistaken:

1. In attempting to minimise the need for cross-references, the authors have omitted them in a number of instances where they would prove valuable, particularly where topics are dealt with exhaustively in one chapter and less fully in others. Thus, the detailed criticism on pp. 731–734 of the *obiter dicta* of Evershed M.R. in *City Permanent B. S.* v. *Miller* could be usefully referred to on pp. 86, 641 and 719. In fact, mentions of the criticism on pp. 511 and 542 refer the reader to pp. 399–400, where the arguments are set out less fully than on pp. 731–734. Similarly, a categorical statement as to the superfluity of acknowledgments for production on p. 329 could well refer to the reasons set out on pp. 398 and 621; and the power of sale of a sole personal representative of a surviving trustee is dealt with briefly on pp. 411 and 791, neither of which passages refers to the full discussion of the problem on p. 453.

2. The small reduction in the volume of footnotes is achieved only at the expense of a considerable increase in volume of the text—a matter of some moment in a book running to almost 1,250 pages. Not all the repetitions appear to be necessary: "Rentcharges capable of being registered" are properly considered in the chapter "Estates capable of being registered" (pp. 179–181) and it seems pointless to repeat the whole passage under "Applications for first registration" (pp. 272–273). The comparison between the "indoor management" and "external position" of a company is made four times—on pp. 203, 481, 546 and 793. Most of the chapter on "Charities" is a paraphrase of pp. 205–211 from "Persons and Corporations capable of being proprietors." The passages which are repeated—and they are many—are never, for some obscure reason, reproduced in *ipsissima verba*, and the sub-purchaser who elects to insist on his vendor becoming the registered proprietor is stigmatised first as "obstreperous" (p. 339), then as "cantankerous" (p. 379), and finally as "pig-headed" (p. 389).

3. The repetitions lead to minor inconsistencies. There are references to the fourteen days' priority for official searches (pp. 51, 520, 708) whereas it is in fact made clear that the priority is for fourteen working days and is dependent on the application being in order (p. 408). (In this respect at

least the unregistered conveyancer would seem to be in a less dangerous position!) The statement that the death of a joint registered proprietor must be proved by production of a death certificate (p. 454) becomes inaccurate when it appears that a grant of representation will suffice (p. 452). A doubtful statement as to the nature of an equitable easement on p. 118 is expanded and thereby corrected on p. 753. The summary of implied covenants for title (pp. 361–364) is particularly affected. A covenant for further assurance is not implied in a transfer of leasehold by way of gift (*cf.* p. 397), nor does the text support the statement that a covenant that he has done nothing in derogation of his grant is automatically implied in any transfer of leaseholds by a trustee. Finally, there are inconsistent versions of the covenants implied on the part of the transferor in a transfer subject to a rentcharge (pp. 357, 499) and as to the fees payable on a personal search of the Index Map in non-compulsory areas (pp. 61, 715).

Case references are rather uneven. *Re Nisbet and Potts Contract*, not *Tulk* v. *Moxhay*, is the authority for the proposition that restrictive covenants affect a squatter (p. 679), and *Page* v. *Midland Ry.*, rather than *Wise* v. *Whitburn*, for the proposition that covenants for title do not exclude known defects (p. 345). The same passage from the opinion of Earl Jowitt in *Att.-Gen.* v. *Parsons* is cited in three different ways on pp. 80, 93 and 105. One particular error which occurs very many times is the citation of Chancery cases since 1932 as "1 Ch.," when there has been only one annual volume of Law Reports Chancery cases. (All the Chancery cases in Chapter 40 are so affected.) *City Permanent B. S.* v. *Miller*, which is correctly cited as [1952] Ch. on p. 86, becomes [1952] 1 Ch. on p. 131 and [1952] 2 Ch. on p. 511.

These are trivial criticisms in a work of this impressive scope. This is an excellent book which fills a gap in legal literature and fills it with authority, clarity and comprehensiveness. It will inevitably become the standard work on the subject of land registration. The law and practice are expounded with such obvious experience and erudition that the reviewer no longer has the temerity to rationalise his prejudices in favour of the old order. He can only echo Mr. Asquith's views on women's suffrage: "I agree it is just. I feel sure they will get it. But, please God, not in my time."

R. G. R.

Reversionary Practice. By J. P. F. PETERS, Solicitor. London: The Solicitors' Law Stationery Society, Limited. 85 and (index) 9 pp. (£1 7s. 6d. net.)

As 1925 recedes further away, investigation of equitable titles becomes less and less important in ordinary conveyancing and a generation is growing up with little knowledge or experience of the subject. Gone are the days when some cautious practitioner was not satisfied with a probate as proof of death or even with a death certificate, but required a burial certificate with a statutory declaration of identity. From time to time, however, some impecunious offspring waiting more and more impatiently for some apparently immortal ancestor to die tries to borrow money on his expectations or some heavy surtax payer gets it into his head that the purchase of reversions may yield tax-free profits, or a chance of them, and the ordinary practitioner has to find out the practice. So, up till now, he has had to turn to *Withers*—if Mr. Peters thinks it unnecessary to give any title other than the author's name, there is no need for us to do so. Mr. Peters's book does not supersede or compete with *Withers*, but he does give a really practical introduction to the subject. It will be quite sufficient for the ordinary case, whether the practitioner is acting for the impecunious offspring or the heavy surtax payer. The author tells us the practice and speaks with authority: he tells

us what must be proved, how it is to be proved, what requisitions to ask, how to draw the declarations in support of title and gives us a number of useful precedents. This is not a class of work where the practitioner can afford to take risks. Bankruptcy searches can reveal that the vendor has no title. Incidentally, we learned that an innocent-seeming address of a member of an aristocratic family was the euphemistic name of one of H.M. prisons.

We detected few omissions or errors: stamp duty is not dealt with, nor the practice of taking assignments in the form of mortgages. The author slips when he states that community of property depends on where the parties are married (p. 36). With respect, this depends entirely on the domicile of the husband at the date of his marriage, and the marriage will be in community even if the marriage takes place elsewhere. The book is, however, remarkably free of faults and will be found invaluable to those unfamiliar with the subject, and useful even to those with extensive experience: a senior partner often derives benefit from a junior partner.

E. F. G.

Foa's General Law of Landlord and Tenant. Eighth edition. By H. Heathcote-Williams, M.A., with E. Dennis Smith, LL.M., Ronald Bernstein, B.A., and Christopher Priday, B.A. London: The Thames Bank Publishing Co., Ltd. clxi, 902 and (index) 158 pp. (£8 8s.)

For the long delay in the appearance of this review the reviewer's personal circumstances are entirely to blame and sincere apologies are due to both editors and publishers.

Foa is one of the three major textbooks on landlord and tenant. Each of the three has its own flavour and its own following. The characteristic of *Foa* is perhaps its logical symmetry and its rigorous effort to relate particular decisions to principles. In reading *Foa* one receives a strong impression of the law of landlord and tenant as a coherent whole and as a unity rather than a collection of unrelated rules. This intellectual attitude to the subject also makes for readability. *Foa*, despite its bulk, is readable. It will be noted that the title is "General Law of Landlord and Tenant," and although two kinds of particular tenancies are dealt with, namely, business tenancies and tenancies of agricultural holdings, the Rent Acts are not included. As Mr. Heathcote-Williams says, however, these Acts are fully and adequately dealt with in the recognised standard textbooks on them and their omission from this book can be justified for that reason. Most practitioners, it is safe to say, would in any case expect to go to the special textbooks on the Rent Acts for their law on this topic rather than to the main landlord and tenant books.

The present editors have preserved the essential character of *Foa* and maintained its high standard, and they are to be congratulated on the manner in which they have carried out their task. Those readers who have remained faithful to *Foa* will not find in the present edition any cause for repenting of their allegiance.

The concession made in Part III to the demands of the particular (business tenancies and agricultural holdings) leads to a certain amount of overlapping. For example, section 11 of the Agricultural Holdings Act, 1948, is treated on page 295 as part of the general subject of "covenants for working the demised property" and is dealt with again on page 819 in one of the chapters on agricultural holdings. Incidentally, the reference on page 296 to an action for damages on the tenant's quitting an agricultural holding is a little misleading, as it seems clear that the landlord's only remedy for dilapidations *at that stage* is arbitration. At the top of page 618 it is suggested that a notice to terminate the tenancy given by a tenant to his

landlord will also terminate any subtenancy. This seems to be consistent with the editors' view on page 832 that *Brown* v. *Wilson* (the important but officially unreported case decided by Hilbery J. at Stafford Assizes in 1949) is wrongly decided. *Sed quaere.* Hilbery J.'s view appears to be in harmony with the general principle stated by no less a master of the common law than Blackburn J. in *Mellor* v. *Watkins* (1874) L.R. 9 Q.B. 400 (a case of surrender). The footnote (u) on page 854 suggests that section 53 of the Agricultural Holdings Act, 1948, applies to grants under the Agriculture (Ploughing Grants) Act, 1952. These, however, are grants in respect of "tenant right matters" (Part II of the Fourth Schedule to the 1948 Act), not in respect of "improvements" (Part I of the Fourth Schedule), and do not, therefore, fall within section 53.

A few minor misprints have been noted. "Healey" should be "Hedley," on pages 819 and 820. The reference on page 522 should be to section 4 (not section 14) of the Agricultural Holdings Act, 1948. The word "Deterioration" in the shoulder-title of paragraph 1277 on page 848 should be "Compensation." The reference to Birkett L.J.'s observations in footnote (u) on page 867 should be to page 374 of the report cited.

J. M. W.

The Taxation of Gifts and Settlements, including Pension Provisions by Stamp Duty, Estate Duty, Income Tax and Surtax. 3rd edition. By G. S. A. Wheatcroft, J.P., M.A. A Master of the Supreme Court (Chancery Division). Assisted by Michael Franks, M.A., Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. xxxviii and 249 pp. (52s. net.)

It seems unlikely that the burden of bringing out a new edition of any legal work can ever be heavier than when the work in question is on the subject of taxation law. Apart from the constant flow of judicial decisions, the legislature seldom seems to allow the opportunity given by the annual Finance Act to pass by without adding to the many complicated and obscure provisions which already bedevil much of this part of the law. The author points out in the Preface that the main legislative changes since the last edition of this book in 1954 have been contained in section 38 of the Finance Act, 1957, which altered the basis of ascertainment and valuation of gifts, and section 28 of the Finance Act, 1958 (curiously, the misprinted reference to this as section 23 in the Preface and on page 63 was not noticed in proof), which imposed a charge for duty on a number of transactions in connection with settled property. Changes on both these topics had been forecast by the author in his previous edition. With regard to section 38, described by him as "one of the most complicated sections ever enacted," it is hard to disagree, after reading his careful account of its provisions (marred only by a small misprint which might, however, cause difficulty: in note 7 on page 56 the reference should be to subsection (3), not (2), of section 38), with his conclusion that "whilst the law before was erratic in its operation it had reached some measure of judicial certainty; the new law bristles with open questions and, unless radically amended, is likely to be a fertile field for litigation in the future." Section 28, though somewhat less complicated, cannot be called simple, but it seems likely to cause less difficulty in its application.

On matters of detail, a few points noticed might, perhaps, be mentioned with future editions in mind. On the last line of page 3 it is submitted that the repeal was in respect of deaths and events *on or after* July 30, 1949. The relevant section refers, for instance, to "a testator . . . dying after the commencement of this Part of this Act." The Act came into force on July 30, 1949, *i.e.*, the first moment of that day, so that the repeal would seem to apply in respect of a person dying at any time on that day. On

page 57 in note 4, *Re Bridgett & Hayes Contract* was reported at page 163 of the report referred to, and the concession was in connection with the construction of section 22 (1) of the Administration of Estates Act, 1925. The penultimate word in the penultimate paragraph of page 99 should, it is thought, be "his" instead of "her." In connection with the Charitable Trusts (Validation) Act, 1954, referred to on pages 120 and 166, it is suggested that it should be made clear that, strange though it may seem, the Act applied only to instruments taking effect before December 16, 1952. On page 139, in the third paragraph, the change in profits tax to a flat rate appears to have been overlooked.

These points are all clearly of very minor character. If one general suggestion might diffidently be put forward, again with future editions in mind, perhaps the author might consider giving more examples to illustrate his propositions. This would be bound to increase the length of the book, of course, and the author is still, in the present edition, entitled to pride himself on having got so much into such small compass, but my personal feeling is that a slight increase in length for this reason would be justifiable. It is a pity that the binding of the new edition remains unaltered so that, externally, the new edition is virtually indistinguishable from the old.

In a foreword to the present edition, the President of the Law Society for 1957–58 has commended this book to the practising lawyer, for whom it is primarily intended, stating that the book ought to be an essential part of every practising lawyer's working equipment. In supporting his commendation, I might add that anyone who has really mastered this book will not merely, in the words of the Preface to the First Edition, have "sufficient knowledge to avoid the pitfalls, deal with the easy problems, and know when to consult the expert." He will be far on the way to being an expert himself.

Shaw's Practical Guide to Valuation for Rating. London: Shaw & Sons, Ltd. x, 199 pp. (£1 10s. net.)

The purpose of this new work, as its title implies, is severely practical. It is intended both as a book of reference for rating surveyors and as a textbook for the student and layman. As a book of reference it has the merits of system and clarity. It sets out in detail a number of valuations appropriate to various kinds of hereditament, explaining in each case both the underlying justification for the method of valuation and the reasons for each step in the valuation. For these reasons it will be of value not only to rating surveyors but also to those legal practitioners who are called upon to understand the mysteries of such valuations. As a textbook for the layman it is less successful, because it is too specialised to be a general introduction to the problems of rating. The book does contain short chapters which are not directly concerned with valuation, but which deal, *inter alia*, with exceptions from rating and valuation list procedure. The treatment of these topics is too condensed to be of much value, and, taken by themselves as a statement of the law, these chapters may, like a little learning, even prove dangerous. As a book on valuation, however, it deserves success.

K. F. G.

Housing. The Annotated Texts of the Housing Act, 1957, and the Housing (Financial Provisions) Act, 1958. By J. D. James, B.C.L., M.A. Butterworth & Co. (Publishers), Ltd. 563 pp. (£2 17s. 6d.)

This book contains the two consolidating Acts which now contain the substance of nearly all the former Acts dealing with housing. The author's

preface refers to the disadvantages of consolidating legislation of this kind, the waste of time involved and the waste of money when books and stocks of forms are rendered obsolete. A quite excellent short chapter in the introductory notes describes the other provisions still left in force by the Acts of 1957 and 1958 and refers to those of them which related to the preservation of obligations entered into thereunder. Whilst it may not be vital to the general practitioner to be warned of these points, it is of great importance to the specialist in local government.

The notes to the sections of the Acts are thorough and complete and appear to be extremely well cross-referenced. One cannot pay a better compliment than by saying that those who were wont to use the late Mr. H. A. Hill's book on Housing will not be disappointed. The notes to section 16 on page 64 are a first-rate guide to demolition order procedure and most helpful to practitioners called on to advise on such proposals. Equally useful are the notes on cases relating to compulsory purchase orders collected together on pages 344 to 350. However, a word of caution appears necessary with regard to the suggested draft form of objection to a compulsory purchase order. With all due respect, this appears to be in the nature of a common law pleading with every form of alternative averment aimed at opening up holes in the compulsory purchase order. It is a kind of "rolled up plea" applied to slum clearance! But the practitioner should remember that the Inspector is a layman and in the long run and the vast majority of cases it is his view formed at the Inquiry and on inspection which decides the issue. On the whole it pays the objector to concentrate all his activities on the strength of his case, *e.g.*, that the house is fit. He may well only annoy everyone and waste time by trying to prove that the local authority lacks resources or cannot rehouse.

There is one point of difficulty in connection with improvement grants which gives rise to much misunderstanding, and this is the question of maximum rents for houses outside the Rent Act limits. This is now dealt with in the Fourth Schedule of the Act of 1958, but it would help to have a rather fuller note bringing out quite clearly the fact that the rent limit does apply to houses outside the Rent Acts improved with the aid of grants.

This is a most excellent book on a subject which is never static. Every year the Government of the day introduces some new measure. Even at the time of writing a Bill has been introduced into the House under the ten-minute rule to put right the present unsatisfactory position with regard to underground rooms following the decision in *Critchell* v. *Lambeth Borough Council* [1957] 2 All E.R. 417, very fully explained by the author in his notes to section 18 (2) of the 1957 Act. Conceivably, this comparatively minor matter might be regarded as of small importance, but a supplement will surely be justified and called for after the coming into force of the House Purchase and Housing Bill and the Town and Country Planning Bill now before Parliament.

R. H. McC.